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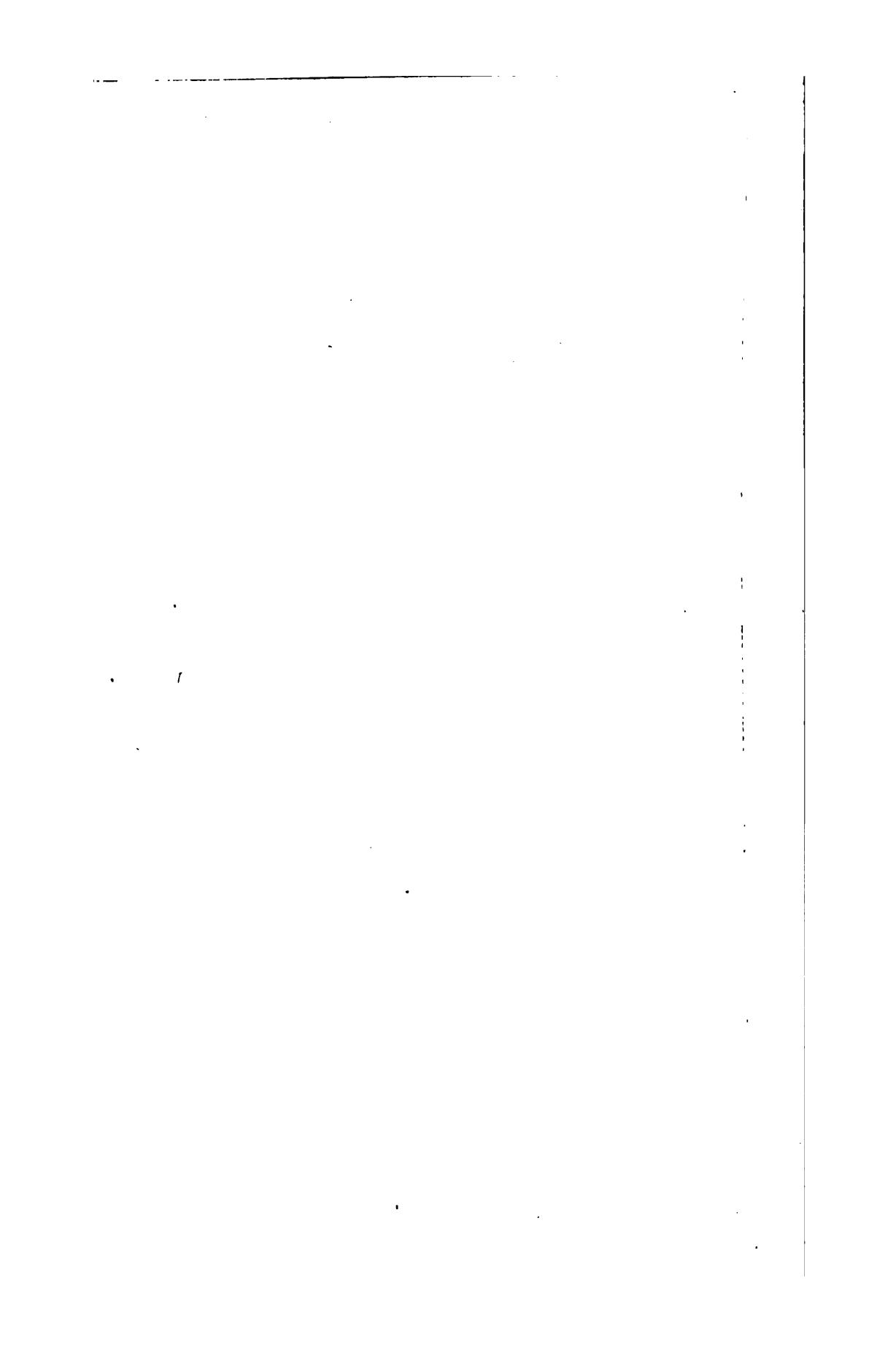
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STATUTORY TORTS

IN

MASSACHUSETTS

BY

WATERMAN L. WILLIAMS

OF THE SUFFOLK BAR

Second Edition

REVISED AND ENLARGED

BOSTON
LITTLE, BROWN, AND COMPANY
1906

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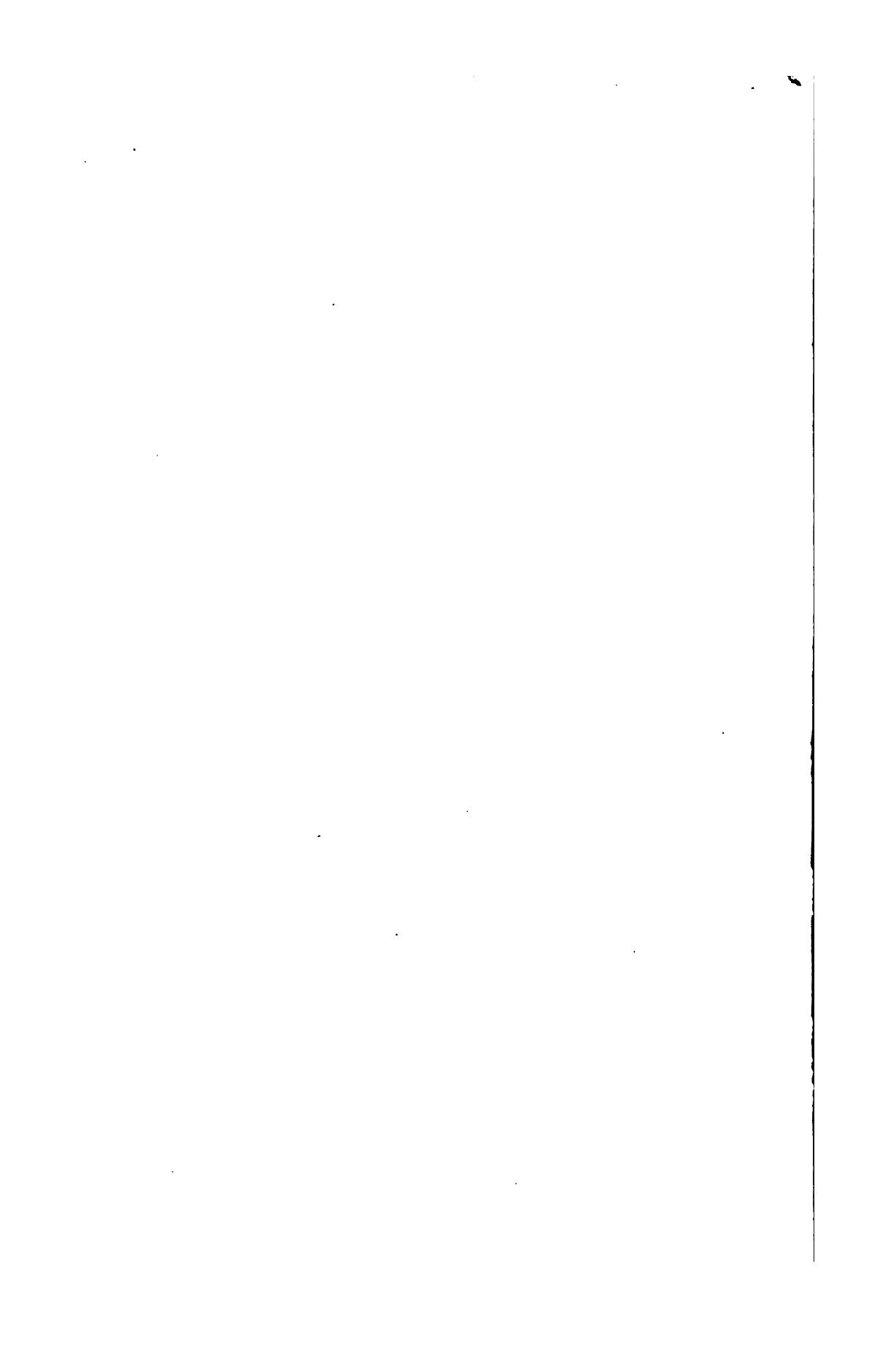
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PREFATORY NOTE

THE preparation of the present edition of this book has been made necessary by the general revision of the statute law of the Commonwealth, which resulted in very considerable changes, both of form and of phraseology, in those sections which serve as the basis of the work. In preparing this edition, the opportunity has been taken not only thoroughly to rewrite and rearrange the material contained in the first edition, and to add thereto the considerable matter to be found in the something like one hundred and fifty cases decided since that edition was published, but as well to add several topics not before treated. As the result of these changes and additions, an entirely new work, though built upon the same plan, is submitted to the legal profession, with the hope that it may find for itself a field of practical usefulness.

W. L. W.

BOSTON, May, 1906.



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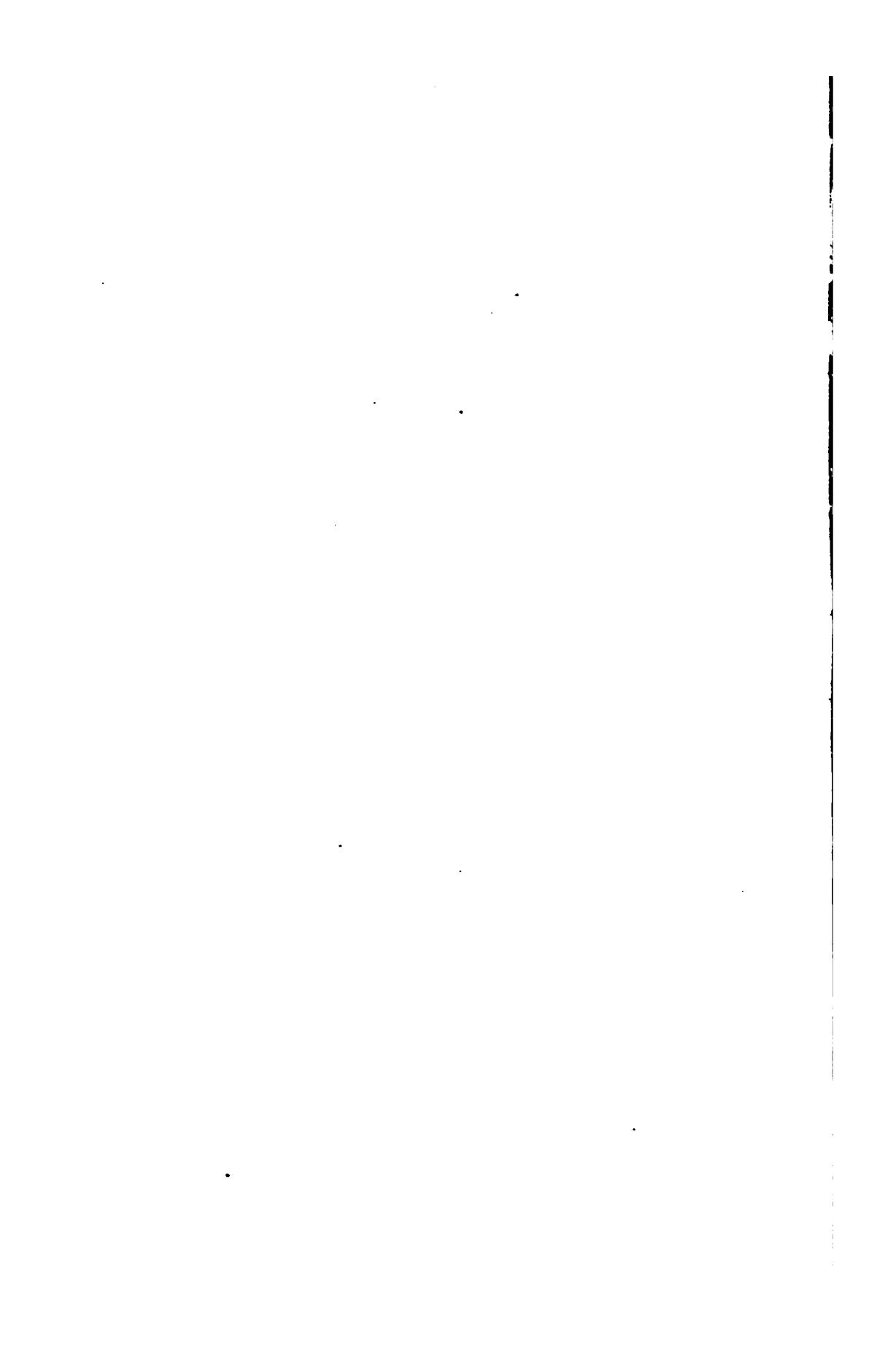
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STATUTORY TORTS.

CHAPTER I.

THE STATUTORY LIABILITIES OF COUNTIES, CITIES AND TOWNS.

PART I.

THE LIABILITY GROWING OUT OF THE CONSTRUCTING, ALTERING OR DISCONTINUING OF HIGHWAYS AND THE MAKING OF SPECIFIC REPAIRS THEREON.

REVISED LAWS, CHAPTER 48, SECTION 27. A person aggrieved by the doings of the commissioners in the estimation of his damages,¹ caused either by laying out, relocating, altering, widening

¹ In every case, in the first instance, the damages sustained by a person in his property by the laying out, relocating, altering or discontinuing of a highway, or by the making of specific repairs thereon, are to be estimated by the county commissioners, Rev. Laws, ch. 48, §§ 13, 14, regard being had to all the damages done him, whether by taking his property or by injuring it in any manner. Ibid. § 15.

As to town ways, the provisions of the statute are the same, save that the damages are, in the first instance, to be assessed by the selectmen or road commissioners of the town. Ibid. § 68. The vital provisions relating to further proceedings where a person is aggrieved by the assessment of his damages, in the case of town ways, though put in a separate section, are the same with slight verbal changes as those of section 27, which are given in the text. They read: Section 80. "A person aggrieved by the assessment of his damages occasioned either by the laying out, relocation, widening, alteration or discontinuance of a town way or private way, or by an order for specific repairs, or of the amount awarded him as indemnity therefor, may have the matter of his complaint determined by a jury, which may be applied for within such time as is specified for such purpose in section twenty-eight. Such application may be made either to the county commissioners or to the superior court as provided in section one hundred and nine. Upon such application to the county commissioners, an order for a jury shall be made by them or, by agreement of the parties, the matter may be determined by a committee to be appointed by the county commissioners; and the jury or committee shall have the same powers, and the proceedings in all respects shall be conducted in the same manner, as before provided in like cases relative to

or discontinuing a highway, or by specific repairs thereon, or in the sum awarded him as indemnity therefor, may, upon petition in writing to the commissioners, have a jury to determine the matter; or he may agree with the parties adversely interested to have the matter determined by a committee which shall be appointed under the direction of the commissioners; or he may apply by petition to the superior court for a jury as provided in section one hundred and nine.

§ 1. The Common Law affords no Remedy in the Cases covered by this Statute.—The property owner who is necessarily injured either by the taking of his land for the construction or alteration of a highway, or by reason of specific repairs made thereon, provided the acts of the town in connection with such work were done in the exercise of a lawful authority, cannot proceed as for a tort. His injury comes within that class which is covered by the maxim *damnum absque injuria*. This rule of the common law rests upon the theory that work of such a character is legal and right, and is therefore to be regarded simply as a proper exercise of the right of eminent domain.²

And not only does the common law afford the landowner

highways. If the damages are increased, the damages and all charges shall be paid by the town; otherwise the charges arising on such application shall be paid by the petitioner or recognizor as aforesaid."

The provisions of section 27, which are given in the text, apply to ways in cities, except as may be otherwise provided by their charters or by special laws. Rev. Laws, ch. 48, § 94. Special provisions relating to ways in the county of Suffolk may be found in sections 88-91 of this same chapter.

The rights of persons aggrieved by the assessment of their damages for land taken or injured by the laying or maintaining of a sewer are determined by the provisions of this statute relating to highways, Rev. Laws, ch. 49, § 4; as also the rights of persons dissatisfied with the estimate of their damages for land taken or injured by the laying out and maintaining of a railroad. Rev. Laws, ch. 111, §§ 99, 103, 104.

The provisions of Rev. Laws, ch. 48, § 27, given in the text, are of ancient origin. For the history of their development see Acts, 1756-57, ch. 18, § 2; Acts, 1786, ch. 67, § 4; Acts, 1812, ch. 121; Acts, 1827, ch. 77, § 12; Acts, 1834, ch. 173, § 1; Rev. Sts. ch. 24, § 14; Acts, 1842, ch. 86, § 3; Acts, 1849, ch. 200; Acts, 1857, ch. 133; Gen. Sts. ch. 43, § 22; Pub. Sts. ch. 49, § 33; Acts, 1892, ch. 415, § 1.

² *Perry v. Worcester*, 6 Gray, 544, 546 (1856); *Peterson v. Waltham*, 150 Mass. 564 (1890).

no remedy in such cases, but the common law right to damages as for a tort is so essentially different from the right to damages given by this statute that an action for tort for the taking of the plaintiff's land and the laying out of streets over it cannot be changed by amendment into a petition for a jury to assess the damages for such taking.³ As was pointed out by Mr. Justice Barker in commenting upon the decision in *Peterson v. Waltham*,⁴ the action of tort goes upon the theory that the acts of the town were unlawful, while the petition under this statute is based upon the theory that the acts of the town were lawful.

§ 2. The Remedy created by this Statute.—The right to proceed for the assessment of damages under the provisions of this statute does not constitute a personal action. It does not fall, consequently, into any of the three classes — contract, tort or replevin — into which such actions are by statute divided.⁵ It is not a right, therefore, which can be submitted to arbitration under the terms of the statutes⁶ which provide for the submission of controversies to arbitration.⁷

The remedy given by this statute is the only one open to the landowner, and, being purely statutory, can be enforced only in the manner therein provided.⁷

"A PERSON AGGRIEVED"

§ 3. The Person aggrieved. His Title to the Land.—The scope of the phrase "a person aggrieved," as used in this statute, is very broad: any person,⁸ having possession of

³ *Peterson v. Waltham*, 150 Mass. 564 (1890).

⁴ 150 Mass. 564 (1890). The comments of Mr. Justice Barker were made in the course of the opinion in *Gray v. Everett*, 163 Mass. 77, 78 (1894).

⁵ "Although the city might be compelled to pay damages upon a proper proceeding, it had made no contract that it would do so, nor had it committed any wrong to the plaintiff in doing that which was done." Mr. Justice Devens in *Osborn v. Fall River*, 140 Mass. 508, 509 (1886).

⁶ Rev. Laws, ch. 194.

⁷ *Osborn v. Fall River*, 140 Mass. 508 (1886).

⁸ As to a trustee as a person aggrieved, the court in *Hawkins v. County Commissioners of Berkshire*, 2 Allen, 254, 258 (1861), says: "We

the land injured, who is adversely affected by the doings of the commissioners is entitled to maintain a petition. And, provided he shows a good possessory title to the property in question, the court will not inquire into the status of the legal title.⁹

§ 4. The County as a Person aggrieved. — Under the highway acts,¹⁰ the damages occasioned to a landowner by the laying out or altering of a highway, and for the recovery of which provision is here made, are in the first instance to be assessed by the county commissioners. The amount of the

do not think it is necessary to the petitioner's right to recover damages, that he should describe himself as trustee. He will be accountable to his *cestuis que trust*, for the damages which he may receive, in the same manner as if he had petitioned in his capacity as trustee."

If the owner of the land dies after the injury has been done, his executor or administrator is the proper party to bring a petition under this statute. "The claim for damages is a chose in action, which the owner in her lifetime might have released by parol, and which passes to the executor or administrator, and not to the heir or devisee, or to any grantee of the land." *Webster v. Lowell*, 139 Mass. 172 (1885). See also Rev. Laws, ch. 48, §§ 31, 32.

In *Merrill v. Berkshire*, 11 Pick. 269, 274 (1831), it was held that one tenant in common could not apply for a jury without the joinder of his cotenants. "The assessment of damages must be joint and cannot be severed by the jury. Tenants in common must join in all actions for injuries to the common estate." But where the cases of several parties were submitted to the same jury, in accordance with the provisions of Rev. Laws, ch. 48, § 29, and the jury agreed on a verdict as to some of them but disagreed as to others, it was held that the verdict being for several damages ought to be accepted *pro tanto*; "the party who thus obtains a verdict for damages, is entitled to the benefit of it, although the jury do not agree as to other subjects committed to them at the same time." *Lanesborough v. County Commissioners of Berkshire*, 22 Pick. 278, 281 (1839). As to parties who have several estates in the same property, see Rev. Laws, ch. 48, §§ 20-24.

* *State Lunatic Hospital v. County of Worcester*, 1 Met. 437, 439 (1840); *Hawkins v. County Commissioners of Berkshire*, 2 Allen, 254, 257 (1861).

Where it appeared that the highway in question was laid out over a street already in existence, that the petitioner claimed title to the central line of the street, and that there was nothing to show that the street had been a public highway, it was held that the court could not infer that the petitioner had not by prescription, by possession, or by some deed established a title to some part of the land taken for the new highway. *Hartshorn v. County of Worcester*, 113 Mass. 111 (1873).

⁹ Rev. Laws, ch. 48, §§ 13-15.

damages thus awarded is in effect the result of its own acts, and hence the county cannot in the very nature of the case be aggrieved thereby. Upon this ground alone, there being no restriction in the statute itself which would require such a construction, it seems to have been uniformly considered by the court that a county could not, under this statute, maintain a petition for a jury to revise the estimate of damages made by the commissioners.¹¹

§ 5. A Railroad Corporation as a Person aggrieved.— Down to 1859 the question seems to have been somewhat in doubt whether a railroad corporation whose tracks had been crossed by a highway could maintain a petition under this statute for the recovery of the damages sustained. In that year, however, it was definitely settled by the decision in *Old Colony Railroad v. County of Plymouth*¹² that such a corporation was entitled to recover damages in the same manner as any private person whose property was taken for public use. In the course of the opinion¹³ in that case, the court lays down the rule¹⁴ that “the petitioners are entitled to recover damages for taking their land for the purposes of a highway, subject however to its use for a railroad; for

¹¹ See *Marshall Fishing Co. v. Hadley Falls Co.*, 5 *Cush.* 602, 604 (1850); *Wrentham v. Corey*, 159 Mass. 93 (1893).

When a town way is laid out or altered by county commissioners and the land damages therefor are assessed by them, the town may be a person aggrieved and apply for a jury to revise the assessment. *Lanesborough v. County Commissioners of Berkshire*, 22 *Pick.* 278, 280 (1839); *Gloucester v. County Commissioners of Essex*, 3 *Met.* 375 (1841); *La Croix v. Medway*, 12 *Met.* 123, 124 (1846); *West Newbury v. Chase*, 5 *Gray*, 421 (1855); and see *Rev. Laws*, ch. 48, § 113. But when the laying out or altering of the town way is done by the selectmen or road commissioners of the town and the damages assessed by them, the town cannot be a person aggrieved within the meaning of the statute. *Wrentham v. Corey*, 159 Mass. 93 (1893).

¹² 14 *Gray*, 155 (1859). *Boston & Albany Railroad v. Cambridge*, 159 Mass. 283 (1893) accord.

¹³ Written by Chief Justice Shaw.

¹⁴ At page 162.

In *Boston & Albany Railroad v. Cambridge*, 159 Mass. 283, 285 (1893), it was held that the railroad was also entitled to recover the expense of erecting and maintaining gates and a gate-house at the crossing, if such structures were necessary, but not the cost of operating the gates.

the expense of erecting and maintaining signs required by law at the crossing; for making and maintaining cattle guards at the crossing, if necessary; and for the expense of flooring the crossing, and keeping the planks in repair.”¹⁵

§ 6. **The Waiver of the Provisions of the Statute.** — The right to recover damages which is given to the property owner by this statute may, like any other right to damages, be waived by him, and such waiver will effectually debar him from afterward proceeding under its provisions. Thus it has been held that “if landowners, desirous of having the road established, in order to induce the commissioners to lay it out, and whilst the question is still open, agree to claim no damages, they are bound by such agreement. A subsequent claim of damages is inconsistent with good faith and fair dealing; and we think the agreement not to make such claim is a good legal bar.”¹⁶ But in order to constitute such a bar, there must be a clear agreement not to claim damages: a mere omission to claim them before the commissioners is not enough.¹⁷

¹⁵ The court in that case also decided that the railroad was not entitled to recover for the increased liability to damage from accidents at the crossing due to the laying out of a highway over its track at grade; nor for the increased expense incident to ringing the bell at the crossing as required by law; nor for the liability of being ordered by the county commissioners at some future time to build a bridge for the highway over its track.

¹⁶ *White v. County Commissioners of Norfolk*, 2 *Cush.* 361, 363 (1848). The fact that the petitioners claimed damages at the time of the locating of the way, which was subsequent to the time of the adjudication of the question of the necessity for the way, is unavailing to remove the bar. *S. C. page 364.*

It was also argued in the White case that the fact that the return of the commissioners stated that no damages were awarded because the benefit to the land was equivalent to the damage was inconsistent with the defence before the jury that the petitioner had waived his rights. But Chief Justice Shaw said, at page 364: “These grounds, though they present the question in different aspects, are not inconsistent, and both bear directly upon the question, whether the petitioners were entitled to damages against the county, which was the real question in issue.”

¹⁷ *Gilman v. Haverhill*, 128 Mass. 36 (1879); *Brigham v. County of Worcester*, 147 Mass. 446 (1888).

"BY THE DOINGS OF THE COMMISSIONERS IN THE ESTIMATION OF HIS DAMAGES,"

§ 7. The Duty of the Commissioners to estimate the Damages. — By the express provisions of the statutes relating to highways, it is the duty of the county commissioners to estimate in the first instance the damages, if any, sustained by persons in their property by the laying out, relocation, alteration, or discontinuance of a highway, or by the making of specific repairs thereon, and to state in their return the share of each owner separately.¹⁸ In making this estimate, they are expressly required to take into consideration all the damages sustained by the landowner, whether by taking his property or by injuring it in any manner, and to deduct the benefit accruing to such property.¹⁹

§ 8. The Estimation of the Value of the Land taken. — The damages due to the actual taking of the petitioner's land for the purposes of a highway are to be estimated according to the value of that land at the time of the taking.²⁰ But this does not mean necessarily that the damages are "to be estimated as the land then lay, unfitted for use as a street; but according to the prospective use of the street when wrought and fitted for use as a part of the street, for a sidewalk or carriage way."²¹

¹⁸ Rev. Laws, ch. 48, §§ 13, 14.

¹⁹ Rev. Laws, ch. 48, § 15.

As to the estimate of the damages of claimants having different interests, see Rev. Laws, ch. 48, § 17.

In the case of town ways, the duty of estimating the damages in the first instance is placed upon the selectmen or road commissioners. Rev. Laws, ch. 48, § 69. But if those officers neglect or refuse to lay out or alter the way, the county commissioners may do so, and in that case may estimate the damages. Rev. Laws, ch. 48, § 74.

In the case of highways in the city of Boston this duty as to estimating the damages rests upon the board of street commissioners of said city. Rev. Laws, ch. 48, § 89.

²⁰ Pitkin v. Springfield, 112 Mass. 509 (1873); Squire v. Somerville, 120 Mass. 579 (1876). In this last case it was held that the cost of filling the land taken, which filling had been done under an order of the city authorities to abate a nuisance, was not necessarily to be added to the value of the land taken.

²¹ Dickenson v. Fitchburg, 13 Gray, 546, 558 (1859).

In getting at the value of the land taken it is within the discretion of

§ 9. The Estimation of other Elements of Damage.— Under the statutes²² the landowner is entitled to recover not alone the value of the land actually taken for the purposes of the highway, but all the damages suffered by him in his property in consequence of the construction or alteration of the way.²³ Hence he is entitled to have included in the

the officer presiding at the trial to exclude, as too remote in point of time, evidence of sales of other lands in close proximity to the land in question, made the year before the taking. *Green v. Fall River*, 113 Mass. 262, 263 (1873). And evidence of an offer made to the petitioner for his land is not competent. *Fowler v. County Commissioners of Middlesex*, 6 Allen, 92, 96 (1863). Likewise evidence of amounts paid to others for land taken from them in the course of altering the same way. *Fall River Print Works v. Fall River*, 110 Mass. 428, 433 (1872).

If the petitioner's land had been dedicated to the public for the purposes of a park prior to the laying out of the highway over it, that fact is admissible in evidence to affect the amount of damages to be assessed for the new use of the surface. *Abbott v. Cottage City*, 143 Mass. 521 (1887).

It has been held that the following persons are qualified to testify as experts to their opinion of the value of the land taken: a special county commissioner, *Dickenson v. Fitchburg*, 13 Gray, 546, 557 (1859); a selectman and assessor of the town, *Sexton v. North Bridgewater*, 116 Mass. 200, 207 (1874), and when he testifies as an expert evidence of the deliberations of the selectmen acting in their quasi-judicial capacity ought not to be received in evidence for the purpose of contradicting him, *Phillips v. Marblehead*, 148 Mass. 326, 329 (1889); the petitioner himself, though naturally his opinion would be entitled to very little weight, *Dickenson v. Fitchburg*, 13 Gray, 546, 554 (1859). And in any case it is competent for a witness called to give his opinion as an expert as to the value of the land taken, to state the grounds and reasons upon which his opinion is founded. *Dickenson v. Fitchburg*, 13 Gray, 546, 555 (1859); *Sexton v. North Bridgewater*, 116 Mass. 200, 207 (1874). The opinion of such witnesses must be confined to the land in controversy; opinion of the value of land in the vicinity is not competent. *Rand v. Newton*, 6 Allen, 38 (1863).

²² Rev. Laws, ch. 48, §§ 13-15.

²³ "There can be no doubt that, in estimating the damage to a landowner, caused by the laying out of a public street over his land, neither the city authorities nor a jury are confined to the value of the land covered by the street. He is also entitled to the amount of the damage done to his remaining land by the laying out of the street." Mr. Justice Metcalf in *First Church in Boston v. Boston*, 14 Gray, 214, 215 (1859); *Geraghty v. Boston*, 120 Mass. 416, 418 (1876) accord. Landowners are not "limited to the injury to their rights of lateral support, excluding the injury to their buildings. The rule which prevails in actions at common law between adjacent proprietors does not apply to this proceeding under the statute, which includes all damages to the owner's property." Mr.

assessment of his damages the cost of such proposed changes in his buildings or in the grade of his land as will best adapt his estate to the new condition of the highway, provided always that such proposed changes are found to be the most reasonable and economical means of restoring the condition of the property.²⁴ The rule is strictly limited by this proviso, and "excludes a recovery for particular improvements in the estate, or changes unreasonably made, or not necessary to put the property in as good condition as before."²⁵ Likewise the cost of erecting a retaining wall²⁶ or a fence,²⁷ where such structures are necessary for the protection of the estate, may be included in the amount awarded.

§ 10. The Estimation of the Damages when the Property does not abut upon the Highway.—The language of the statute is sufficiently broad so that the landowner may be entitled, under its provisions, to recover damages, although no part of his land has been taken and although the property affected by the changes in the highway was situated at some distance therefrom. Accordingly the rule has become estab-

Justice Colt in Hartshorn *v.* County of Worcester, 113 Mass. 111, 114 (1873).

"Hartshorn *v.* County of Worcester, 113 Mass. 111, 114 (1873); Buell *v.* County of Worcester, 119 Mass. 372, 374 (1876); Bemis *v.* Springfield, 122 Mass. 110, 117 (1877).

* Mr. Justice Colt in Buell *v.* County of Worcester, 119 Mass. 372, 375 (1876). See also Chase *v.* Worcester, 108 Mass. 60, 67 (1871), where Mr. Justice Wells lays down the rule that, "aside from the value of the land taken, the damages to the petitioner were the amount of depreciation in value of the remaining land, taking into consideration all the circumstances of the condition in which it was left by the changes made in the street, and its capabilities either for sale or valuable use in that condition, or for improvement in such mode as the owner might choose." But this rule does not give him the right to recover, as an independent element of damages, the amount subsequently assessed upon him for the cost of constructing a sidewalk along his remaining land, or the expense he may incur in the care of such sidewalk. Cushing *v.* Boston, 144 Mass. 317 (1887).

* Bemis *v.* Springfield, 122 Mass. 110, 117 (1877).

* First Parish in North Bridgewater *v.* County of Plymouth, 8 Cush. 475 (1851).

For a case where the amount of the damages to be awarded turned on the width of the graded portion of the street, see Como *v.* Worcester, 177 Mass. 543 (1901).

lished that if, by reason of the construction or alteration of a public way, "damage results to real estate which is direct and proximate, as distinguished from remote and consequential, and which is special and peculiar as distinguished from general, the fact that the property does not abut upon the public way will not bar a recovery."²⁸ Thus, where it appeared that the petitioner's estate was situated at a distance from the highway, to which access was had by a private way; that, by reason of the making of alterations in the highway, the petitioner was unable to use this private way for a period of four months; and that during that time the rental value of the estate was materially decreased, it was held that being thus deprived of the use of the highway was a special and peculiar damage for which reasonable damages might be recovered under this statute.²⁹

§ 11. The Benefit to be deducted in making the Estimation of the Damages.— It is not every benefit which may accrue to the estate of the landowner by reason of changes in the highway that is to be taken into account in assessing his damages under the provisions of this statute: only such benefit is to be considered as is direct and special to his estate, as distinguished from a general benefit shared in common with all the other estates upon the same street.³⁰ It does not necessarily follow, however, that a benefit is not direct and special because other estates upon the same street are benefited in a like manner.³¹ "The kind of benefit, which is not allowed to be estimated for the purpose of such deduction, is that which comes from sharing in the common advantage and convenience of increased public facilities, and the general advance in value of real estate in the vicinity

²⁸ Chief Justice Knowlton in *Munn v. Boston*, 183 Mass. 421, 423 (1903). Accord: *Dana v. Boston*, 170 Mass. 593, 595 (1898); *Davenport v. Dedham*, 178 Mass. 382, 384 (1901).

²⁹ *Munn v. Boston*, 183 Mass. 421 (1903).

³⁰ *Green v. Fall River*, 113 Mass. 262, 263 (1873); *Hilbourne v. County of Suffolk*, 120 Mass. 393 (1876); *Parks v. County of Hampden*, 120 Mass. 395 (1876); *Cross v. County of Plymouth*, 125 Mass. 557 (1878).

³¹ *Allen v. Charlestown*, 109 Mass. 243 (1872); *Abbott v. Cottage City*, 143 Mass. 521, 526 (1887).

by reason thereof. The advantages of more convenient access to the particular lot of land in question, and of having a front upon a more desirable avenue, are direct benefits to that lot, giving it increased value in itself. It may be the same, in greater or less degree, with each and every lot of land upon the same street. But such advantages are direct and special to each lot. They are in no proper sense common because there are several estates, or many even, that are similarly benefited.”³²

§ 12. Where no Estimation of Damages is made. — The omission by the county commissioners to make any estimation of the damages suffered by a landowner by reason of the construction or alteration of a highway is, for the purposes of this section, equivalent to the statement that no damages have been sustained by him. Being thus in effect an adjudication by them against his claim, the landowner is entitled, if he considers himself to be aggrieved thereby, immediately to petition for a jury to determine the matter under the provisions of this section; and must do so, if at all, within the time limited for such action.³³

³² Mr. Justice Wells in *Allen v. Charlestown*, 109 Mass. 243, 246 (1872).

In *Boston & Maine Railroad v. County of Middlesex*, 1 Allen, 324, 331 (1861), it was held that any future benefit which might accrue to the railroad from the laying out of the highway, by reason of the house-lots into which adjacent land had been divided and which the highway had opened up, was too remote, inconsiderable and contingent to be taken into account to diminish the damages suffered by laying out the highway over its tracks. And the rule is the same as to any supposed benefit which may accrue to the railroad by reason of an increased travel on its road. *Old Colony, etc. Railroad v. County of Plymouth*, 14 Gray, 155, 163 (1859).

³³ *Childs v. County of Franklin*, 128 Mass. 97 (1880); *Monagle v. County Commissioners of Bristol*, 8 Cush. 360, 362 (1851).

In *Chace v. Fall River*, 2 Allen, 533 (1861), the jury brought in a verdict that the complainants have sustained damage by means of the laying out of the street and allow damages to each of them as follows, viz. “To Edmund Chace, nothing.” It was contended that this verdict should be set aside as repugnant. But the court held otherwise, ruling that it was a verdict that the complainants have sustained no damages for which they are entitled to compensation.

"**CAUSED EITHER BY LAYING OUT, RELOCATING, ALTERING,
WIDENING OR DISCONTINUING A HIGHWAY,"**

§ 13. The Laying out or Altering must be Legal. — No right to recover damages under this section can be acquired unless the laying out or altering of the highway has been according to law. Hence the burden rests upon the landowner, if he would entitle himself to maintain a petition, to show that all the requirements of the statutes relating to the laying out, the relocating, the altering or the widening, as the case may be, of the highway in question have been complied with.³⁴

§ 14. The Damages in Cases of the Discontinuance of a Highway. — Where his access to the system of public streets remains substantially unimpaired, the fact that a landowner suffers inconvenience in common with all the rest of the community by reason of the discontinuance of a highway, or portion of a highway, will not give rise to a claim for damages under this section. And this is the law, even though, because of the close proximity of his land to the discontinued way, he feels the inconvenience more keenly than some other members of the community. In order to establish a claim for damages, he must go further and show some peculiar or specific injury which was a direct and immediate consequence of the discontinuance.³⁵ Thus if, after the way has been discontinued, the means of access to his estate remain ample, it has been held that the landowner cannot recover damages, although the money value of his property has been diminished by the consequent diversion of travel.³⁶

The natural effect of this rule commonly, though not universally, is to limit the right to recover damages in cases of this kind to owners of land abutting upon the discontinued highway.

* *Perry v. Sherborn*, 11 Cush. 388, 390 (1853); *Blaisdell v. Winthrop*, 118 Mass. 138 (1875).

* *Smith v. Boston*, 7 Cush. 254 (1851); *Castle v. County of Berkshire*, 11 Gray, 26 (1858). He can establish no claim at all for damages unless he first shows that there has been discontinued a legally established way. *Perry v. Sherborn*, 11 Cush. 388, 390 (1853).

* *Stanwood v. Malden*, 157 Mass. 17 (1892).

"OR BY SPECIFIC REPAIRS THEREON,"

§ 15. What are Specific Repairs? The Extent of the Remedy in Cases of such Repairs. — It is oftentimes puzzling to determine whether the repairs made in any particular case come under the head of specific repairs or of ordinary repairs made for the purpose of rendering the highway safe and convenient for travel. At the same time it is important to reach a correct solution of the difficulty in order that the land-owner may not mistake his remedy.³⁷ The determination of the question turns mainly upon, first, the nature and, second, the source of the order for the repairs. To come within the meaning of the term "specific repairs," the repairs must be so specified in the order for them that the condition of the highway after they are made can be determined from the order itself.³⁸ And specific repairs can only be ordered by an authority competent to fix the grade of highways; if the order was not made by such an authority, even though the repairs to be made are fully specified therein, they are not "specific repairs."³⁹

The remedy given by this section, where the injuries are due to specific repairs, is not confined to the owners of land abutting upon the repaired highway, but may be availed of by any person who sustains damages in his property by the making of such repairs.⁴⁰

³⁷ *Stoughton v. County Commissioners of Norfolk*, 5 Gray, 372 (1855). In this case it was held that the landowner who, where the raising of the grade was not done by the selectmen of the town for the purpose of repairing the way but by the county commissioners in the alteration of the way, proceeded against the town under other statutes for his damages, had mistaken his remedy, and that a writ of certiorari should issue to quash the proceedings ordering the warrant for the jury.

³⁸ *Sullivan v. Fall River*, 144 Mass. 579 (1887); *Dana v. Boston*, 170 Mass. 593 (1898).

³⁹ *Albro v. Fall River*, 175 Mass. 590 (1900).

The action of the city government granting a street railway company the right to build its railway along certain streets is not an order for specific repairs or for a change of grade within the meaning of Rev. Laws, ch. 48. *Vigeant v. Marlborough*, 175 Mass. 459 (1900). See also *Underwood v. Worcester*, 177 Mass. 173 (1900).

⁴⁰ *Dana v. Boston*, 170 Mass. 593 (1898).

In *Bemis v. Springfield*, 122 Mass. 110, 117 (1877), it was held that

"MAY, UPON PETITION IN WRITING TO THE COMMISSIONERS,
HAVE A JURY TO DETERMINE THE MATTER;"

§ 16. **The Nature of the Right created by this Provision.** — The right to have a jury to determine the matter of his damages, which is given to the landowner by this section, is in its nature an absolute right. Whether or no he will have a jury pass upon his case rests with him alone. Speaking of this provision in the early case of *Carpenter v. County Commissioners of Bristol*,⁴¹ Mr. Justice Morton says: "This is imperative and leaves nothing to the discretion of the commissioners. However plain it may appear to them that the party has suffered no damage, or that he has no title to the land injured, or that his interest in it is not affected, they have no power to reject an application for a jury. The party has a right to have these questions re-examined by that constitutional tribunal, and whether he will exercise that right or not, must depend entirely on his own discretion."

When, however, the petition has been filed and the commissioners have entered the order for a jury, the landowner must take notice of that order and must proceed seasonably⁴² with the necessary steps to have his case brought before the jury; it is not the duty of the commissioners to see that those steps are taken. Failing so to do, he may lose entirely his right to recover damages under this section. "The petitioner's right to a jury was a right which he might waive and abandon, and which must be taken to have been abandoned if the statute requirement is not complied with."⁴³

§ 17. **The Form of the Petition. Amendments.** — A petition under this section should contain a particular descrip-

evidence as to the amount of damages which had been assessed to other landowners by reason of the cutting down of the grade of an adjacent street was not competent evidence of the damage in that case.

⁴¹ 21 Pick. 258, 261 (1838).

In case of their refusal so to do, mandamus will lie to compel the county commissioners to grant the proper process for a jury. s. c.

⁴² Rev. Laws, ch. 48, § 46, provides that if a jury is ordered they shall be summoned and shall give their verdict within three months after the date of the order.

⁴³ *Thorndike v. County Commissioners of Norfolk*, 117 Mass. 566, 569 (1875).

tion of the injured land and should set forth its situation relative to the highway in question, together with allegations of injury sustained by the landowner in his property in consequence of the laying out, altering, or discontinuing, as the case may be, of the way in question.⁴⁴ It is not, however, necessary to set out in detail all the elements of damage claimed.⁴⁵

It seems that if, according to the view of the county commissioners, a petition is not in proper form, they have the right to require amendments to be made, or even to reject it as defective. But by acting upon it and ordering a jury to hear and adjudicate thereon, they waive all right to interpose objections of form to the acceptance of the verdict of the jury.⁴⁶

Petitions for the assessment of damages under this section come within the spirit of the statutes relating to amendments. Hence it has been held that an amendment changing a petition for damages to property by reason of acts done for the purpose of repairing the highway⁴⁷ into a petition under this section for the assessment of damages due to the laying out of a highway might properly be allowed, provided at the time when the proceedings were begun the petitioner had a right to the latter remedy, and provided the work relied on in support of the amended petition was the same cause of action relied upon in the petition originally filed.⁴⁸

⁴⁴ *Perry v. Sherborn*, 11 Cush. 388, 390 (1853).

⁴⁵ *Stone v. Heath*, 135 Mass. 561 (1883).

⁴⁶ *Thayer v. County Commissioners of Worcester*, 10 Cush. 151, 154 (1852).

⁴⁷ Under Rev. Laws, ch. 51, § 15.

⁴⁸ *Gray v. Everett*, 163 Mass. 77 (1895). "Such petitions," says the court in that case, "are of the same general character, and are to be tried at the same bar and in the same manner. The same acts of the town upon the surface of the ground within the limits of the way will sustain one petition if they are repairs of a pre-existing way, and the other petition if they are done in the construction of a way newly laid out."

In *Dickenson v. Fitchburg*, 13 Gray, 546, 553 (1859), it was held that a petition under this section might go to the same jury with a petition under Rev. Laws, ch. 51, § 15.

§ 18. The Filing of the Petition. Not the Beginning of a New Proceeding. — Petitions under this section may be filed with the clerk of the county commissioners at any time, and the filing of them constitutes the beginning of proceedings thereunder.⁴⁹ Having been once filed, a petition cannot be discontinued except by leave of court or by agreement of all the parties;⁵⁰ nor can the petitioner be prejudiced by any delay of the commissioners in issuing the warrant for the jury.⁵¹

The petition is not, however, the beginning of a new proceeding. It is rather another step in the same proceeding, and is in the nature of an appeal from the decision of the county commissioners.⁵²

§ 19. The Petition must be to the County Commissioners. — The petition prescribed by the statute must be made to the board designated therein;⁵³ an application addressed to any officials other than those named cannot be made to serve as the foundation of proceedings under this section.⁵⁴

The judicial action of the county commissioners is not according to the course of the common law, and hence may be reviewed by the court by writ of certiorari.⁵⁵

§ 20. The Powers of the Jury. — In relation to the assessment of damages under this section, the powers of the jury are coextensive with those of the county commissioners. Hence they may increase or diminish the amount of the damages assessed by the commissioners as they see fit.⁵⁶

The jury have, however, no power to consider a case not

⁴⁹ Rev. Laws, ch. 48, § 111.

⁵⁰ Rev. Laws, ch. 48, § 112. This section further provides that "any party thereto may prosecute the same as if it had been begun by him."

⁵¹ *Brookline v. County Commissioners of Norfolk*, 114 Mass. 548, 550 (1874).

⁵² *Danforth v. Groton Water Co.*, 176 Mass. 118 (1900), and see *New Haven & Northampton Co. v. Northampton*, 102 Mass. 116, 122 (1869).

⁵³ *Eaton v. Framingham*, 6 Cush. 245 (1850).

⁵⁴ *Monagle v. County Commissioners of Bristol*, 8 Cush. 360, 362 (1851).

⁵⁵ *Warner v. County of Franklin*, 131 Mass. 348 (1881).

⁵⁶ *Merrill v. Berkshire*, 11 Pick. 269, 275 (1831); *Carpenter v. County Commissioners of Bristol*, 21 Pick. 258, 261 (1838).

properly presented by the petition. Thus, where a petition claimed damages for injuries to lands of a man and his wife, it was held that the jury could not assess damages for injuries to land held exclusively by the man in his own right.⁵⁷

"OR HE MAY AGREE WITH THE PARTIES ADVERSELY INTERESTED TO HAVE THE MATTER DETERMINED BY A COMMITTEE WHICH SHALL BE APPOINTED UNDER THE DIRECTION OF THE COMMISSIONERS;"

§ 21. The Committee — Under this and subsequent provisions⁵⁸ of this statute, the county commissioners may agree with the petitioner to substitute a committee in the place of a jury. In cases where this substitution is made, the committee is required to make its report within three months after its appointment.⁵⁹

"OR HE MAY APPLY BY PETITION TO THE SUPERIOR COURT FOR A JURY AS PROVIDED IN SECTION ONE HUNDRED AND NINE."

§ 22. The Petition to the Superior Court — By virtue of this provision the landowner is given the right to file his petition in the superior court, although no application to,

⁵⁷ *Thayer v. County Commissioners of Worcester*, 10 Cush. 151, 155 (1852). But it was further held in that case that the county could not object if the jury apportioned the damages awarded to the husband and wife. "If the party petitioning for the damages does not object to the severance, it is immaterial to the county."

In *Warner v. County of Franklin*, 131 Mass. 348 (1881), it appeared that there were two highways which intersected each other, laid out over the petitioner's land; that by some mistake he had filed a petition praying for damages for land taken for one of the highways only; that upon discovering the mistake, and within the year allowed therefor, he had filed a new petition praying for the assessment of the damages for lands taken for both ways. The court held that the issuing of a single warrant for both claims, upon proof to the satisfaction of the county commissioners of the mistake under which the petitioner had acted in presenting the first petition and obtaining the first warrant, did no injury to the county, and was within the power of the commissioners; although if upon a consideration of all the circumstances they had declined to issue a second warrant to estimate damages for the land included in the first warrant, the court would not have compelled them to do so.

⁵⁸ Rev. Laws, ch. 48, § 40.

⁵⁹ Rev. Laws, ch. 48, § 46.

nor award by, county commissioners shall be made prior to the filing of such petition.⁶⁰

SECTION 28. Such petition to the commissioners for a jury may be made at any time before the expiration of one year, in the case of the taking of land, from the day when the highway is entered upon and possession taken for the purpose of constructing the same,⁶¹ in the case of specific repairs, from the day when the work is actually commenced on the way, and in all other cases, from the date of the order providing for the same; but if before the expiration of the year a suit is instituted wherein the legal effect of the proceedings of the commissioners is drawn in question, such application may be made within one year after the final determination of the suit.

§ 23. **The Effect of this Section.** — The landowner, if he would avail himself of the rights given by the preceding section of this statute, must strictly comply with the provisions of this section. Hence a failure on his part to file a petition with the commissioners within the time fixed therefor is fatal; he cannot proceed.⁶²

But if he has filed his petition within the time limit, his rights are saved and cannot be adversely affected by a delay of the commissioners in taking action upon it.⁶³

§ 24. **What Suits may have the Effect to extend the Time Limit.** — It seems that the suits referred to in the latter part of this section embrace only suits wherein the party making

⁶⁰ Rev. Laws, ch. 48, § 109.

⁶¹ "Where a way is laid out over the land of several persons, an entry for the purpose of constructing any part of the way is deemed a taking of possession of all the lands included in the laying out made upon the same petition." Hence actual entry upon the land of a petitioner may not be necessary to give rise to rights under this statute. *Wheeler v. Fitchburg*, 150 Mass. 350 (1890).

⁶² *Monagle v. County Commissioners of Bristol*, 8 CUSH. 360, 362 (1851); *Bennett v. County Commissioners of Worcester*, 4 Gray, 359 (1855); *Childs v. County of Franklin*, 128 Mass. 97 (1880); *Sisson v. New Bedford*, 137 Mass. 255 (1884).

⁶³ *Brookline v. County Commissioners of Norfolk*, 114 Mass. 548, 550 (1874).

The time limit fixed in this section applies to town ways as well as to highways. Rev. Laws, ch. 48, § 80; also to cities, notwithstanding any other provision in their charters or in special laws. Rev. Laws, ch. 48, § 94.

application for a jury is a party and bound by the judgment, or proceedings like the writ of certiorari, where a judgment establishing or avoiding the act of taking the land for the way is, like a judgment *in rem*, binding upon all persons. Hence a suit by another person acting solely for the protection of his own property, there being no privity between him and the petitioner, and the judgment in that suit not being binding upon the petitioner in the full sense, would not, it appears, come within the meaning of this part of the section.⁶⁴

PART II.

THE LIABILITY GROWING OUT OF THE MAKING OF GENERAL REPAIRS UPON HIGHWAYS.

REVISED LAWS, CHAPTER 51, SECTION 15. If an owner of land adjoining a way who sustains damage in his property by an act done for the purpose of repairing the way, files his petition for compensation with the mayor and aldermen or selectmen or road commissioners, after the commencement and within one year after the completion of the work, they shall, within thirty-days after the filing of said petition, unless the parties otherwise agree in writing, determine the amount of his damages and deduct therefrom the benefit, if any, to the complainant for such repair.

§ 25. No Liability of this Character at Common Law.—The rule became well established at an early date that damage necessarily done to the property of an individual by changes of grade made by a town in its highways, for the purpose of rendering them safe and convenient for travel, and while acting under the authority and injunction of the statutes,¹ constitutes no tort. It is purely *damnum absque injuria*, for which the common law provides no remedy.

⁶⁴ See Shute v. Boston, 99 Mass. 236 (1868).

Mandamus is the proper remedy to compel the county commissioners to draw an order on the county treasurer for the payment of the amount of a verdict recovered in proceedings under this statute. Harrington v. County Commissioners of Berkshire, 22 Pick. 263, 268 (1839).

¹ Rev. Laws, ch. 51, § 1: Highways, town ways, causeways and bridges shall, unless otherwise provided, be kept in repair at the expense of the

Hence no action of tort will lie either against the officials by whom the work was done,² or against the town in its corporate capacity.³

This rule of the common law is based upon the theory that when land is taken for a highway the damages paid to the owner of the property include not alone the value of the land so taken but as well compensation for whatever injury may be occasioned to his adjoining land by such a reduction or elevation of the grade of the way as the convenience of travel may, at any future time, require; and any subsequent purchaser of such adjoining land must, in the view of the law, be taken to have fixed the price he paid with the possibility of such changes of grade always in mind. Alterations of this character, made in the surface of its highways, were thus, before the enactment of this statute, simply a legitimate exercise by the town of its right and duty to make its ways reasonably safe and convenient for travel, and involved no legal responsibility.⁴

city or town in which they are situated, so that they may be reasonably safe and convenient for travellers, with their horses, teams and carriages at all seasons.

² Callender *v.* Marsh, 1 Pick. 418 (1823); Elder *v.* Bemis, 2 Met. 599 (1841); Proctor *v.* Stone, 158 Mass. 564 (1893).

Even the fact that the work was improperly and wantonly done will not, it has been held, render the official by whom it was so done personally liable. Benjamin *v.* Wheeler, 15 Gray, 486, 491 (1860).

³ Flagg *v.* Worcester, 13 Gray, 601 (1859); Jamaica Pond Aqueduct *v.* Brookline, 121 Mass. 5 (1876).

In Callender *v.* Marsh, 1 Pick. 418 (1823), it was argued that the 10th Article of the Declaration of Rights, which provides for compensation where land is taken for public use, applied also to the case of an alteration of the grade of a highway, where the landowner was injured in respect to an incorporeal right. In answer to this argument Chief Justice Parker said, at page 430: "There has been no construction given to this provision, which can extend the benefit of it to the case of one who suffers an indirect or consequential damage or expense, by means of the right use of property already belonging to the public. It has ever been confined, in judicial application, to the case of property actually taken and appropriated by the government."

⁴ Callender *v.* Marsh, 1 Pick. 418, 431 (1823). In that case Chief Justice Parker says: "The streets on which the plaintiff's house stands had become public property by the act of laying them out conformably to law, and the value of the land taken must have been either paid for,

§ 26. The General Scope of the Statutory Liability. — This section of the statute presupposes the existence of the highway. All those damages which result from changes made in the course of its original location and construction are excluded from its operation.⁵

Furthermore, this section is based upon the assumption that no specific orders for the repairs made have been passed by the authorities who, under the statutes,⁶ are given the power to pass orders for the making of specific repairs upon highways. Hence all damage due to specific repairs made upon the highway are also excluded from its operation.⁷

Between these two extremes lies the proper and peculiar field for the application of this statute. Speaking in general terms, all those injuries to the adjoining landowner that result from general repairs made upon the highway in the ordinary course of events for the purpose of rendering it safe and convenient for travellers, come within the scope of the statutory liability here created.

§ 27. The Construction of the Statutory Liability. — The liability of towns under this statute, being in derogation of the common law, is construed strictly, and hence cannot be extended beyond those cases for which the statute makes express provision. This principle is well illustrated by the

or given to the public, at the time, or the street could not have been legally established. Being legally established, although the right or title in the soil remained in him from whom the use was taken, yet the public acquired the right, not only to pass over the surface in the state it was in when first made a street, but the right also to repair and amend the street, and, for this purpose, to dig down and remove the soil sufficiently to make the passage safe and convenient. Those who purchase house lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of a city may require, in order to render the passage to and from the several parts of it safe and convenient, and as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they shall see fit." See also Mr. Justice Cooley's explanation of this rule in *Pontiac v. Carter*, 32 Mich. 164, 172 (1875).

⁵ *Geraghty v. Boston*, 120 Mass. 416 (1876); *Snow v. Provincetown*, 109 Mass. 123 (1872).

⁶ Rev. Laws, ch. 48, §§ 9, 58.

⁷ *Sisson v. New Bedford*, 137 Mass. 255 (1884). And see § 28, post.

case of *Jamaica Pond Aqueduct v. Brookline*.⁸ There it appeared that the petitioner, a water company, had laid and was maintaining under the highway a line of pipes, which, in consequence of the raising of the grade of the way, it was obliged to take up and relay. The court held that the expense incident to that work could not be recovered from the town under the statute. "This gives a right to compensation only to the owner of land adjoining the highway. The petitioner has a peculiar easement in the soil under the highway, but cannot by any reasonable construction of language be said to be 'an owner of land adjoining the highway.'"⁹

But within the cases covered by it, this statutory remedy is construed to be exclusive; the right to compensation cannot be enforced in any other way.¹⁰

§ 28. General Repairs and Specific Repairs. The Distinction between them and its Importance.—The injuries for which compensation is provided in this section of the statute, as already pointed out,¹¹ are limited to such as result from ordinary repairs or alterations of grade made by a highway surveyor or other like officer for the purpose of rendering the way safe and convenient for travel. Hence, since compensation for injuries occasioned by specific repairs or alterations of grade cannot be recovered under it,¹² it becomes

⁸ 121 Mass. 5 (1875).

⁹ Mr. Justice Morton in *Jamaica Pond Aqueduct v. Brookline*, 121 Mass. 5 (1875), at page 5.

The history of the origin of this statutory liability is somewhat singular. It is thus summarized by Chief Justice Shaw in *Brown v. Lowell*, 8 Met. 172 (1844), at page 176: "Although it was intimated by the court, in that case [*Callender v. Marsh*, 1 Pick. 418 (1823)], that it would be equitable, in extraordinary cases of damage to coterminous proprietors, from changing the grade of streets, to make some allowance, yet no provision to that effect was ever made by the legislature, until the adoption of the Rev. Sts., ch. 25, § 6, where the provision is new. Indeed this provision was not reported by the commissioners, nor by the large legislative committee; but it must have been introduced when the subject was before the legislature for its final adoption." The Revised Statutes were adopted in November, 1835.

¹⁰ *Elder v. Bemis*, 2 Met. 599, 604 (1841); *Flagg v. Worcester*, 13 Gray, 601, 606 (1859).

¹¹ See § 26, *ante*.

¹² *Sisson v. New Bedford*, 137 Mass. 255, 261 (1884); *Stoughton v. County Commissioners of Norfolk County*, 5 Gray, 372 (1855). It seems

important clearly to distinguish between general and specific repairs or alterations of grade. The elements of difference as pointed out by Mr. Justice Field are:¹³ When a change is made in the grade of a public way in a city, if it is made by an authority competent to fix the grade, and the nature and extent of the change are specifically declared in, and made a part of, the record of the proceedings, the repairs made in accordance therewith are regarded as specific repairs. But if the repairs are made or ordered by an authority not competent to fix the grade of the way, or if made or ordered by an authority competent to fix the grade but the order does not determine specifically the nature and extent of the change to be made, and the way is repaired, either by an actual change of grade or otherwise, under an authority competent to direct the repair of ways, so that they may be safe and convenient for travellers, such repairs fall within the category of ordinary repairs.¹⁴

"IF AN OWNER OF LAND ADJOINING A WAY"

§ 29. An Owner of Land. Is a Lessor an Owner?—A person having the legal title to a parcel of real estate is that the reverse is also true: the remedy provided for in case of an order for specific repairs "is the only one that can be pursued, if the objection to the other procedure is distinctly made." *Sisson v. New Bedford*, 137 Mass. 255, 261 (1884).

¹³ In *Sullivan v. Fall River*, 144 Mass. 579 (1887), at page 585.

¹⁴ Speaking of this distinction in *Proctor v. Stone*, 158 Mass. 564 (1893), at page 567, Mr. Justice Barker says: "Changes of grade are of two general classes: one where a grade other than that which has before existed is prescribed by boards or officers who have jurisdiction to order alterations or specific repairs; the other where the change occurs, without an adjudication, in so repairing the way as to make or keep it safe and convenient, and to better adapt it for uses for which it had before been intended. The former is not in a strict sense a repair, but a permanent change or alteration, as when a road is lowered or raised to pass under or over a railroad, and is really a substitution of one way for another, although both are within the same location. As held in *Bemis v. Springfield*, 122 Mass. 116, such radical changes are not to be made in the discharge of their ordinary duties by highway surveyors, or other officials or agents charged merely with keeping roads in repair, but are ordered by county commissioners or municipal governments under statute powers which are exercised in formal proceedings prescribed by the statutes."

"an owner of land" within the meaning of this clause, so long at least as the land remains in his possession.¹⁵ Whether or not, after he has given up his possession to a lessee under a lease in writing, and hence has only a reversionary interest in the land at the time when it is injured by the repairs made in the highway, he is still "an owner of land," and so entitled to enforce the remedy here provided, has not yet been settled. While this exact question was raised by counsel in the case of *Norwich & Worcester Railroad v. Worcester*,¹⁶ it was not decided, the court holding that the land in question had not come under the operation of the lease at the time when the change of grade that occasioned the injury was made.

§ 30. The Land must adjoin the Highway.—The right to compensation created by this statute is strictly limited to an owner whose land adjoins the highway where the repairs that caused the injury were made. An owner of land cannot, therefore, recover under this section for injuries due to repairs made on other, though neighboring, streets;¹⁶ nor for injuries to an easement in the soil under the street occasioned by changes in its grade.¹⁷

¹⁵ *Norwich & Worcester Railroad v. Worcester*, 147 Mass. 518 (1888).

¹⁶ *Wilbur v. Taunton*, 123 Mass. 522 (1878). In this case the petitioner alleged that he owned land on A Street which was injured by repairs made on A Street, P Street and S Street, each of which was, it appeared, a distinct and separate street. The court below ruled that the petition could not be maintained because it prayed for compensation on account of repairs on other streets than A Street. It was held that, although he could not recover for injuries due to the repairs made on P Street and S Street, he could recover for the damage occasioned by the repairs on A Street. "The petition in question," says Mr. Justice Colt at page 524, "contained all the allegations necessary to give jurisdiction to and call for the action of the mayor and aldermen. It alleges the petitioner's ownership of land adjoining one of the streets named, and damage occasioned by the repairs of that street, with a prayer for compensation. If he is confined by law to that one street, then this is a petition for damages for repairs in that street only. The prayer for damages for repairs on other streets, upon which he was not alleged to be an owner, was mere surplusage, which could not defeat his valid claim, and which could not have prejudiced the rights of the defendant on the trial of the question."

¹⁷ *Jamaica Pond Aqueduct v. Brookline*, 121 Mass. 5 (1876). This was a case where the petitioning company was maintaining a line of

§ 31. The Actual Repairs need not be in Front of the Land injured. — While the injured land must adjoin the highway on which the repairs are made, the landowner is not limited to such damages as are occasioned by the particular repairs made in front of his estate. He is entitled under this statute also to recover compensation for all injuries that result from the work as a whole, done for the purpose of making repairs upon the adjoining highway. Thus, where it appeared that within the limits of the highway, between the wrought portion and the land of the petitioner, there was a bank of earth which gradually sloped down to the level of the highway and upon which was a road used as a means of access to the petitioner's land; that the surveyor of highways removed portions of this bank of earth, and thereby destroyed the road leading to the petitioners' land, but did not actually take any of his land; that the most of the earth so removed was used on the highway for the purpose of making repairs at points within from twenty to sixty rods of the petitioner's land, only a few shovels full being used directly opposite thereto: it was held that the town was liable for the damage done by the removal of the whole amount of earth, and not merely that part used directly in front of the petitioner's land.¹⁸ "There is no law," said Mr. Justice Lord in delivering the opinion,¹⁹ "by which the damages are to be limited to repairs made upon the road immediately in front of the estate. The injury to be compensated is an injury to the particular estate, by the repairing the way generally; and the making an excavation in front of the plaintiff's estate, for the purpose of using the materials upon another portion of the way not adjacent to the estate, may be an injury to the estate for which compensation may be had."

water pipes under the street at the time when its grade was raised. It was held that the company was not, by reason of its easement in the soil under the street, an owner of land adjoining a highway in any such sense as to entitle it to recover under this statute for the expense of raising and relaying its pipes, which had been made necessary by the elevating of the grade.

¹⁸ *Burr v. Leicester*, 121 Mass. 241 (1876).

¹⁹ At page 244.

" WHO SUSTAINS DAMAGE IN HIS PROPERTY "

§ 32. The Damage sustained. Not strictly limited to such Damages as the Common Law might recognize. — The injuries for which this statute provides compensation vary widely in character. "The intention of the Legislature clearly was to provide a remedy by which the landowner whose property had been injured could recover compensation for all the damages which he had sustained by the act of repair."²⁰ The cutting off of a ready access to the adjoining land, whether due to an actual raising or lowering of the grade of the highway in front of it for the purpose of repairing or improving that particular portion,²¹ or due to the making of an excavation in front of the adjoining land for the purpose of getting materials to be used in repairing or improving other portions,²² is perhaps the commonest form of damage which comes within this provision.

The landowner, however, is not confined to damages of that character; he may recover compensation, even though the injury is not such as the common law would recognize if the suit was against an individual. This rule is illustrated by the case of *Woodbury v. Beverly*,²³ where it appeared that the effect of raising the grade of the highway had been to prevent surface water on the petitioner's land from flowing

²⁰ Mr. Justice Morton in *Woodbury v. Beverly*, 153 Mass. 245, 248 (1891).

In *Garvey v. Revere*, 187 Mass. 545, 547 (1905), which was a petition for damages occasioned to land by the raising of the grade of the adjoining street, the court says: "The measure of damages was the difference between the value of the petitioner's property immediately before the change in grade and its value immediately after, less the special benefit and advantage to her estate caused by the change of grade. The reasons which induced the municipal authorities to change the grade of the street are not material in determining either the damage sustained by the petitioner or the benefit received by her." Hence it was held that evidence tending to show that the raising of the grade was necessary in order that a system of drainage, which was afterward put in but was not included in the order for the alteration, might be put in, and that the system could not have been put in if the grade of the street had not been raised as it was raised, was rightly excluded.

²¹ *Snow v. Provincetown*, 109 Mass. 123 (1872).

²² *Burr v. Leicester*, 121 Mass. 241 (1876).

²³ 153 Mass. 245 (1891).

off as it had been accustomed to do, and to cause it, together with the wash from the street, to flow into his cellar, thereby rendering his premises damp, unhealthy, and of less value than before the repairs were made. It was contended by counsel that the word "damage" as used in this section included only damages for which under like circumstances an action at common law would lie against an individual.²⁴ But the court held that the word could not be so limited. "There is nothing in the statute," said Mr. Justice Morton,²⁵ "to indicate that the Legislature used it in this restricted sense. . . . If the repair causes surface water to flow or remain upon premises where it did not flow or remain before, and such premises are thereby rendered damp, wet, unhealthy, and less valuable than before, the landowner certainly 'sustains damage in his property' by reason of the repair. It is none the less a damage because resulting from surface water which the action of the town in the repair of its way has caused to flow or remain on the premises of the landowner."

§ 33. Where the Town causes the Damage by repairing Changes in the Surface of a Highway due to the Action of Nature.—The restoration or partial restoration of a highway to its established grade, from which it had fallen away by reason of either the gradual or the sudden action of nature, creates no liability under this section, even though the adjoining land is thereby left on a different level. This rule was established in the recent case of *Garrity v. Boston*.²⁶

²⁴ As the court stated in this case, at page 247: "It is well settled that an action of tort will not lie against a city or town for causing surface water to flow from its streets or ways upon the premises of a land-owner which adjoin such streets or ways, or for preventing the surface flow from such premises. *Flagg v. Worcester*, 13 Gray, 601; *Barry v. Lowell*, 8 Allen, 127; *Turner v. Dartmouth*, 13 Allen, 291; *Bates v. Westborough*, 151 Mass. 174; *Collins v. Waltham*, 151 Mass. 196." The rule is the same in the case of an individual. *Gannon v. Hargadon*, 10 Allen, 106 (1865).

²⁵ At page 248.

²⁶ 161 Mass. 530 (1894).

Evidence tending to show that damages have been awarded to other abutters is not admissible in proceedings under this section. It is *res*

In that case it appeared that F Street had been built up to the established grade in 1874 and the petitioner's land had then been raised to conform to the grade of the street; that in 1890 the street, having fallen away from its established grade, was raised, though not up to such grade; that by this raising of its grade the street was some three feet above the petitioner's adjoining land. It was held that the injury resulting from this change in the grade of F Street was due rather to the fact that the petitioner had not kept his land to the established grade than to the fact that the grade of the street had been raised. In this view of the case it made no difference whether the falling away of the street and adjoining land was sudden or gradual. "If an earthquake

inter alios and not competent as an admission on the part of the town. *Donovan v. Springfield*, 125 Mass. 371, 373 (1878).

In *Allen v. Gardner*, 147 Mass. 452 (1888), it was contended in defense that the surveyor of highways, having previously used all the money appropriated for his district, made the repairs in question without the written consent of the selectmen, and therefore that the petitioner could not recover for any damage in his property by the repairs so made. But the court declined to sustain this contention. "A highway surveyor," said Mr. Justice Knowlton in delivering the opinion, at page 453, "is a public officer, charged with the duty of keeping the roads in his district in repair, and his official acts, done within the ordinary scope of the authority of such officers, after his public money is all expended, and without the written consent of the selectmen, are not illegal. . . . And so far as they cause damages to the estates of individuals by repairs upon the highways, they are treated as done under competent authority. . . . It is obvious that a different rule would be likely to work great injustice; for landowners along a highway often have no means of knowing whether the appropriation for the use of a highway surveyor has been exhausted, or whether or not he is working with the written consent of the selectmen; and in case of injury to their estates, if they could not hold the town responsible for the consequences of his official acts, they would be without remedy."

And so in *Mitchell v. Bridgewater*, 10 Cush. 411 (1852), it was objected that the town was not liable to the petitioner for the damage occasioned to his premises by the raising of the adjoining highway because the work was done by the surveyor of highways without instructions from, or the express authority of, the selectmen of the town. But the court held that this objection was untenable. "The change in the grade of the road was made solely for the purpose of repairing it, in pursuance of Rev. Sts. ch. 25, § 6. It was fully within the power and authority of the surveyor to make such repairs, without any instructions from the selectmen, and the town is liable for the damages thereby occa-

or a violent storm should cause a change of grade in a portion of a street and in a lot of land, it could hardly be contended that the restoration of the street to its established grade gave the lot owner a right to have his lot restored to grade at the expense of the city. And if the sinking is gradual, we see no reason why the city has not the right to maintain the street at its established grade, without further compensation than it has already paid.”²⁷

“BY AN ACT DONE FOR THE PURPOSE OF REPAIRING THE WAY,”

§ 34. The Nature of the Act done.— This provision is very broad in its scope; it includes any act of repair done upon the highway for the purpose of making it safe and convenient for travel by an officer having due authority.²⁸ Thus it has been held that “the making of adequate provision, by work and labor upon the soil within the legally established boundaries of a highway, for the removal of water which collects upon it, to the inconvenience of travellers, whether it be by drains or ditches, or by the lowering of other parts of its surface, must undoubtedly be considered an act done thereon for the purpose of its repair.”²⁹ So also the removal of a bank of earth located within the limits of the highway, which had served as a means of access to the adjoining land, and the use of the earth so removed in making repairs upon the highway at different points not opposite to that land, has been held to be an act done for the purpose of repairing the highway within the meaning of this provision of the statute.³⁰

§ 35. The Effect of the Act done. At what Time the Liability arises.— Under the provisions of this statute no right to compensation accrues until the repairs that cause the damage have been actually made; a vote to make them is not an “act done” within the meaning of this clause, so as sioned.” And see also, on the question of the authority of the surveyor to make the repairs, *Thurston v. Lynn*, 116 Mass. 544 (1875).

²⁷ Mr. Justice Lathrop, at page 532.

²⁸ *Mitchell v. Bridgewater*, 10 Cush. 411, 413 (1852).

²⁹ *Flagg v. Worcester*, 13 Gray, 601, 606 (1859).

³⁰ *Burr v. Leicester*, 121 Mass. 241 (1876).

to give rise to the claim to damages.³¹ "It is the act done, we think, and not the vote contemplating a future act, that may never be done, which gives the claim for damage. There is, in this respect, a manifest distinction between a vote to alter the grade of a way, and a vote or adjudication, laying out a way over private property. The latter appropriates the land to the public, and devests the right of the owner to the exclusive use and possession of it, from the time it is passed. But the former is simply a declaration of purpose, by the trustees for the public, to use their own land in a particular way; but it does not affect the estate, or alter the condition of adjacent proprietors, until the act is done."³²

§ 36. **For the Purpose of Repairing the Way.** — This provision strictly limits the scope of this section to acts done by the proper authorities of the town for the purpose of making the highway reasonably safe and convenient for travel.³³ The nature of the act done and as well the character of the person by whom it is done, are of first importance.

Acts done by officials of a town for purposes other than repairing the highway, such as acts done in the course of the original construction or of the alteration of the highway, create, therefore, no liability under this section. Thus, where it appeared that the highway in question, which had long been used by the public, was in 1870 laid out and accepted by the proper officials and a plan showing its grade filed in the city clerk's office; that nothing was done by way of changing its grade until 1874, when the grade opposite the petitioner's premises was raised about a foot, in exact accordance with said plan; it was held that this change of

³¹ *Brown v. Lowell*, 8 Met. 172 (1844). And see § 38, *post*.

³² Chief Justice Shaw in *Brown v. Lowell*, 8 Met. 172 (1844), at page 177.

³³ Speaking of the remedy under this statute in *Dana v. Boston*, 170 Mass. 593 (1898), Mr. Justice Barker, at page 594, says that it is given "where the raising, lowering, or other act done is for the purpose of making such repairs as can be made, without other authority, by highway surveyors or other officials charged with the duty of keeping highways reasonably safe and convenient for travellers, as required by Pub. Sta. ch. 52, § 1."

grade was a part of the original construction and not an act done for the purpose of repair, and hence the petition under this statute could not be maintained.³⁴

Likewise, acts done upon the highway by parties other than officials of the town, for purposes of their own, although such acts may have the incidental effect of rendering the highway more safe and convenient for travellers, do not create any liability under this section. Thus, where the grade of the highway was raised by a street railway company in the course of the construction of its road bed, it was held that this change of grade was the act of the street railway company alone and not something done for the purpose of repairing the way, and hence gave to the adjoining land-owner no right to compensation for the damages it caused.³⁵

"FILES HIS PETITION FOR COMPENSATION WITH THE MAYOR AND ALDERMEN OR SELECTMEN OR ROAD COMMISSIONERS,"

§ 37. The Filing of the Petition.— This provision of the section creates a condition precedent, and no right to compensation can be enforced unless application to the officials named has been duly made.³⁶ It has been held accordingly

* *Brady v. Fall River*, 121 Mass. 262 (1876). For additional cases bearing upon this question see *Snow v. Provincetown*, 109 Mass. 123 (1872); *Lane v. Boston*, 125 Mass. 519 (1878); *Cambridge v. County Commissioners*, 125 Mass. 529 (1878); *Dana v. Boston*, 170 Mass. 593 (1898).

** *Vigeant v. Marlborough*, 175 Mass. 450 (1900).

*** *Brown v. Lowell*, 8 Met. 172, 178 (1844); *Walker v. West Boylston*, 128 Mass. 550 (1880). In this last case it appeared that the respondent had accepted the statute of 1871, chapter 158, which provided that in matters concerning highways road commissioners should have exclusively "the powers and be subject to the duties, liabilities, and penalties of selectmen and surveyors of highways"; and that the petitioner had presented his petition to the selectmen. The court held that the assessment of damages in such a case was a duty concerning highways which was expressly transferred by the statute to the road commissioners, and that the petition should therefore have been presented to them; not having been presented to them, it was properly dismissed.

In *Garvey v. Revere*, 187 Mass. 545 (1905), it appeared that the petition was taken to the office of the board of selectmen in the town hall at Revere, at a time when the board was not in session, and was handed to one member of the board in the presence of two other members. It was held that this was sufficient to constitute a proper filing of the petition with the selectmen. "The petitioner had done all that she could do, and

that an application made to another branch of the city government, as the city council, even though the mayor and aldermen are by charter provision constituent members of such branch, was not a compliance with the requirements of this clause.³⁷

"AFTER THE COMMENCEMENT AND WITHIN ONE YEAR AFTER THE COMPLETION OF THE WORK,"

§ 38. The Petition must be filed within the Time limited. — "The effect of this provision," says the court in *Page v. Boston*,³⁸ "is to fix a limit of time within which an owner, who has sustained damage, may commence proceedings to recover compensation therefor, but not to determine the time when his claim for damages accrues."³⁹ Failure to file a petition within the time here limited affords a complete defence to any claim for damages under the statute.⁴⁰

"THEY SHALL, WITHIN THIRTY DAYS AFTER THE FILING OF SAID PETITION, UNLESS THE PARTIES OTHERWISE AGREE IN WRITING, DETERMINE THE AMOUNT OF HIS DAMAGES"

§ 39. The Duty of Fixing the Compensation. — It is to be observed that the judicial duty of determining, in the first instance, the amount to be awarded for the injury suffered by the landowner by reason of the repairs made upon the adjoining highway is imposed by this provision upon those officers of the town who are charged with the duty of if the selectmen failed to make a record of the fact of the filing, or otherwise failed in their duty, such failure cannot affect the petitioner."

"*Brown v. Lowell*, 8 Met. 172, 179 (1844). "On such petition," says the court, "the mayor and aldermen might have voted him a compensation, and that vote been negatived by the common council. Could he have claimed the damages, or appealed from the decision to the county commissioners, as a person aggrieved by the determination of the mayor and aldermen? We think not."

"*106 Mass. 84* (1870).

"The court adds to the sentence here quoted: "We are of opinion that it was not intended to repeal or affect the construction of the preceding provisions, adopted in *Brown v. Lowell*," 8 Met. 172. In that case the court had held that "it is the act done, we think, and not the vote contemplating a future act, that may never be done, which gives the claim for damages."

"*Revere v. Boston*, 14 Gray, 218 (1859).

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making the repairs.⁴¹ This is in furtherance of that general policy of the legislature which has made those officers of a town who are charged with the care of its highways — whether in respect to the laying out, constructing, altering, or specifically repairing of them — the judges in the beginning of the damages caused by their own acts.

§ 40. **What constitutes a Determination of the Amount of Damages. The Failure to make any Determination.** — This provision of the statute contemplates positive and affirmative action on the part of the officers indicated, to measure the extent of the damage occasioned by the repairs made by them. Such action is not, however, absolutely essential to the enforcement of the rights here given. A total failure on their part to determine the amount of the damage done is equally effective; such a failure to take action is held to be equivalent to a determination that the petitioner has suffered no damage.⁴²

§ 41. **The Determination of the Amount of Damage Essential to Further Proceedings.** — A determination upon the question of damages by the officers designated, either positive or negative in character, is a necessary step in the enforcement of the rights created by this statute.⁴³ “Such a determination is the basis of all subsequent proceedings, and without it the county commissioners had no authority to act in the premises.”⁴⁴

But the fact that there has been no such determination, to constitute a defence, must be seasonably taken. As the court says in *Flagg v. Worcester*,⁴⁵ where the objection was

⁴¹ See *Walker v. West Boylston*, 128 Mass. 550 (1880), where it appeared that the town had accepted an act of the legislature which imposed the duties of selectmen relative to highways upon road commissioners, and that the petitioner had filed his petition with the selectmen: the court held that the duty of assessing damages occasioned by the making of repairs upon highways was transferred by that act to the road commissioners, and that therefore the petition should have been presented to them for determination.

⁴² *Viscardi v. Great Barrington*, 174 Mass. 406, 407 (1899).

⁴³ *Brown v. Lowell*, 8 Met. 172, 178, 179 (1844).

⁴⁴ Mr. Justice Bigelow in *Flagg v. Worcester*, 8 Cush. 69, 71 (1851).

⁴⁵ 8 Cush. 69 (1851).

first taken at the argument on the acceptance of the verdict: "If the respondents intended to avail themselves of such an objection, it was their duty to have taken it at the outset. They cannot be permitted to come in and submit in silence to the jurisdiction of the commissioners, and after having taken their chance of a favorable verdict, defeat the proceedings by objections, which must have been within their knowledge during the preliminary proceedings."⁴⁶

"AND DEDUCT THEREFROM THE BENEFIT, IF ANY, TO THE COMPLAINANT FOR SUCH REPAIR."

§ 42. The Benefit to be allowed. — The benefits for which deduction may be made under this provision of the statute, are confined to such as are direct and special, peculiar to the land in question and increasing its value. While the mere "common advantage and convenience of increased public facilities" are disregarded, yet benefits may be direct and special, even though other premises upon the same street are benefited in like manner. Thus, where the result of raising the grade was a dryer and pleasanter street in front of the petitioner's land and more convenient access thereto, it was held that these benefits should be set off against the damages, although the same benefits were common to other lots on the same street.⁴⁷

SECTION 16. If the petitioner is aggrieved, either by the estimate of his damages or by a refusal or neglect to estimate the same, he may, within one year after the expiration of said thirty days, apply for a jury, and have his damages ascertained in the manner⁴⁸ provided when land is taken in laying out highways, or he may, by agreement with the adverse party and upon application made within the same time, have them ascertained by a committee which shall be appointed, if the way is in the city

"The court adds, at page 71: "Besides, it may well be taken for granted in ulterior proceedings in cases of this kind, when the contrary is not shown by the record, that it was made to appear satisfactorily to the commissioners, that such determination by the mayor and aldermen had taken place."

⁴⁶ *Donovan v. Springfield*, 125 Mass. 371 (1878).

⁴⁷ This phrase includes the limitation of time. *Erskine v. Boston*, 14 Gray, 216, 218 (1859).

of Boston, by the superior court, and if elsewhere, by the county commissioners in their respective jurisdictions.

§ 43. When a Petitioner is aggrieved. — A petitioner is aggrieved within the meaning of this section only when he has duly filed his petition for compensation with the officers designated in section 15, and they have taken some action thereon, either positive or negative,⁴⁹ within the thirty days allowed them for action. Thus, the fact that he has presented his petition to the proper officers, but after the time allowed therefor has expired, and they have refused to estimate his damages, does not make him an aggrieved party and entitle him to proceed under this section.⁵⁰ And likewise the fact that he has presented his petition to other officers of the town than those designated and that they have rejected it does not make him an aggrieved party within the meaning of this section.⁵¹

§ 44. Estoppel to claim Damages under the Statute. What has been held not to constitute such Estoppel. — The fact that the petitioner joined in the application for the change of grade which caused the damage to his property will not estop him from recovering compensation therefor under this statute. "That alone is not evidence of an assent that his property shall be taken for public use without compensation."⁵² So also it has been held that a waiver of a right to damages for another injury growing out of the same general work, such as the injury due to depositing gravel on his land in the course of altering the grade, will not estop the petitioner from recovering damages occasioned to his land by that altering of the grade.⁵³

⁴⁹ See § 40, *ante*.

⁵⁰ *Revere v. Boston*, 14 Gray, 218 (1859).

⁵¹ *Brown v. Lowell*, 8 Met. 172, 178, 179 (1844). In such a case the county commissioners have no jurisdiction.

⁵² *Barker v. Taunton*, 119 Mass. 392, 397 (1876).

⁵³ *Mitchell v. Bridgewater*, 10 Cush. 411, 413 (1852).

Points relating to Pleading and Practice. — Strict rules of pleading are not to be applied to proceedings under this statute, and hence a petition which is imperfect and informal may still be sufficient. *Allen v. Gardner*, 147 Mass. 452, 455 (1888). In that case "the petitioner alleged that he was the owner of land, which, without fully describing

PART III.

THE LIABILITY GROWING OUT OF THE FAILURE PROPERLY
TO MAINTAIN HIGHWAYS.

REVISED LAWS, CHAPTER 51, SECTION 17. If the life of a person is lost by reason of a defect or a want of repair of or a want of a sufficient railing in or upon a way, causeway or bridge, the county, city or town or person by law obliged to repair the same shall, if it or he had previous reasonable notice of the defect or want of repair or want of railing, be liable in damages not exceeding one thousand dollars, which shall be assessed with reference to the degree of culpability of the defendant and recovered in an action of tort, commenced within one year after the defect or want of railing was sufficiently designated; that he had suffered damage in his property by the removal of earth from the street in front of it; that the work had been done for the purpose of repairing the street; and that he was entitled to compensation, which he petitioned the board to award him." It was held that this petition, although imperfect and informal, was sufficient.

Formal notice of the application for a jury should be given to the town, so as to enable it to act by its proper officers. It has been held, therefore, that proceeding to grant a warrant for a jury without notice to the town was erroneous, and that this objection was not avoided by proof that some of the officers of the town in fact knew of the pendency of the applications before the county commissioners. *Brown v. Lowell*, 8 Met. 172, 180 (1844).

A juror who has a claim against the respondent town of the same general character as that of the petitioner, and who feels himself to be aggrieved by the conduct of the town in relation to it, is not so free from all prejudice and bias as to be a fit and impartial juror to try a like claim pending against the town. *Flagg v. Worcester*, 8 CUSH. 69, 72 (1851).

In *Mitchell v. Bridgewater*, 10 CUSH. 411, 413 (1852), objection was made to the warrant issued by the county commissioners on the ground that it did not direct the sheriff to summon the jurors from the particular county where the land was located. It was held that the objection could not prevail.

An amendment may be allowed changing a petition under this statute into a petition for the assessment of damages occasioned by the laying out of the way, "if, when the proceedings in the Superior Court were begun, the petitioner had the right to the latter remedy, and if the work upon the way relied upon in support of the amended petition was the cause of action relied upon in the petition originally filed." *Gray v. Everett*, 163 Mass. 77 (1895).

As to costs and other points in practice, see *Rev. Laws*, ch. 48, § 109.

year after the injury causing the death by the executor or administrator of the deceased person, for the use of the widow and children of the deceased in equal moieties, or, if there are no children, to the use of the widow, or, if there is no widow, to the use of the next of kin.

SECTION 18. If a person sustains bodily injury or damage in his property by reason of a defect or a want of repair or a want of a sufficient railing in or upon a way, causeway or bridge, and such injury or damage might have been prevented, or such defect or want of repair or want of railing might have been remedied by reasonable care and diligence on the part of the county, city, town or person by law obliged to repair the same, he may, if such county, city, town or person had or, by the exercise of proper care and diligence, might have had reasonable notice of the defect or want of repair or want of a sufficient railing, recover damages therefor from such county, city, town or person; but he shall not recover from a county, city or town more than one-fifth of one per cent of its state valuation last preceding the commencement of the action nor more than four thousand dollars, and no action therefor shall be maintained by a person whose carriage and the load thereon exceeds the weight of six tons.¹

¹ Legislation upon this subject dates back to a very early period. See Mass. Col. St. 1648; 2 Mass. Col. Rec. 229; Mass. Col. Sta. (ed. 1672) 12; Prov. St. 1693-94, ch. 6, §§ 1, 8; 1 Prov. Laws (State ed.) 136, 137; Anc. Chart. 55, 56, 267, 280. But the first statute enacted after the adoption of the Constitution was that of 1786, ch. 81, § 7. This act provided that "if any person shall lose a limb, break a bone or receive any other injury in his person" through any defect in the public ways, he may recover of the county, town, or person obliged to keep same in repair, in case they had reasonable notice of the defect, double the damages sustained; and if the life of a person is lost through such defect, "or for want of rails on any bridge," the county, town, or persons obliged to repair such way shall be liable to a penalty of one thousand pounds, to be recovered by indictment or presentment and to be paid to the executor or administrator, "for the use of the heirs, devisees or creditors," provided that actual notice of the want of repair had been given in a manner specifically required.

The law remained substantially in this form down to the time of the revision in 1836. Several important changes were then made. The latter part of the statute of 1786, covering the provisions relative to causing death, was embodied in a separate section, and the requirement as to notice was so far modified as to require simply that "the county, town, or person had previous reasonable notice of the defect." Rev. Sta. ch. 25, § 21. The first portion of the statute of 1786 — that portion containing the provisions as to causing injury to the person — was also made a separate section, and so amended as to give a right to recover the amount of damage sustained where the injury was caused by a defect which had

§ 45. The Source of the Liability.— It was adjudged by the full court, in a case decided near the beginning of the pres-

existed for the space of twenty-four hours; and to recover double the damages so sustained if the county, town, or person had reasonable notice of the defect. Rev. Sts. ch. 25, § 22. The twenty-third section of the same chapter of the Revised Statutes introduced the provision relative to making a tender, which was retained without change in all subsequent revisions, down to the Revised Laws, 1902.

Two years later the legislature inserted into the provisions of the Revised Statutes, ch. 25, § 22, the exemption from liability where the vehicle and load exceeded six tons in weight. Acts, 1838, ch. 104.

In 1850 that provision of the Revised Statutes, ch. 25, § 22, as to the recovery of double damages was repealed, and the section so amended as to make the recovery of the damages sustained depend upon the condition: "if such county, town, or persons had reasonable notice of the defect, want of repair, or of sufficient railing, or if the same had existed for the space of twenty-four hours previous to the occurrence of the injury." Acts, 1850, ch. 5.

In the general revision ten years later the provisions of the Revised Statutes as to causing death, ch. 25, § 21, were simply re-enacted without change, see Gen. Sta. ch. 44, § 21; while the provisions of the statute of 1838, ch. 104, and of the statute of 1850, ch. 5, were combined and incorporated in section 22 of the same chapter.

During the succeeding seventeen years the legislature made no alteration in this law, but at the end of that period several changes and additions were made. Acts, 1877, ch. 234. This act, after providing in the first section that the highways should be kept in repair at the expense of the towns in which they were situated, so altered the liability for causing personal injury as to make it depend upon whether the defect that caused it might have been remedied, or the damage or injury might have been prevented by reasonable care and diligence on the part of the county, town, or person obliged to make repairs, and added the requirement, "if such county, town, place or persons had reasonable notice of the defect or might have had notice thereof by the exercise of proper care and diligence." See § 2. The third section provided that the injured party should within thirty days give notice of the time, place, and cause of the injury, and placed the limit to the amount that might be recovered at four thousand dollars. And the fourth section provided to whom and by whom said notice should be given, and also made provision for the giving of the same in those cases where it had not been given within the prescribed time by reason of physical or mental incapacity. In the following year an additional limit was placed upon the amount that might be recovered, so as to restrict it to a sum not greater than one-fifth of one per cent of the valuation of the town. Acts, 1878, ch. 259.

Two acts dealing with this subject, each making important changes, were passed by the legislature in 1881. The first of these changed the remedy, in cases where death was caused, from indictment to an action of tort, to be brought within one year by the executor or administrator of the deceased, and provided that the amount recovered, which should

ent century, that towns² were not liable at common law to a private action for injuries caused by reason of a defect or want of repair in their highways.³ Whatever liability rests upon them in such cases is, therefore, purely statutory.⁴

not exceed one thousand dollars, should be assessed according to the degree of culpability of the county or town. Acts, 1881, ch. 199, §§ 4, 5. The second of these acts so amended the provisions of the statute of 1877 in regard to notice as to require that it be "in writing, signed by the person injured or by some one in his behalf;" and added the provision for the giving of the same where the injured party died without having given it. Acts, 1881, ch. 236.

In the Public Statutes the prior legislation was re-enacted with but slight change and made a part of chapter 52. Thus, the provisions of the statutes as to causing death, viz. Gen. Sts. ch. 44, § 21, and Acts, 1881, ch. 199, §§ 4, 5, were blended together and incorporated in section seventeen. The provisions of the second and third sections of chapter 234 of the Acts of 1877 are re-enacted in sections eighteen and nineteen respectively; while the provisions of chapter 259 of the Acts of 1878 are re-enacted in section twenty, and the provisions of the statute of 1881, chapter 236, are embodied without substantial change in section twenty-one.

The only changes made since the enactment of the Public Statutes have had the effect, first, to limit the liability where the injury was sustained by reason of snow and ice, Acts, 1896, ch. 540, and second, to make more clear the provisions of the statute relating to the notice of the time, place, and cause of the accident. Acts, 1882, ch. 36; Acts, 1888, ch. 114; Acts, 1894, ch. 389 and ch. 422.

By the provisions of chapter 406 of the Acts of 1902, "actions of tort for injuries to the person against counties, cities and towns, shall be commenced only within two years next after the cause of action accrues."

² For the sake of convenience the word "town" only is used throughout this part of the chapter in referring to municipal corporations, whether in the particular case such corporation was a county, city or town.

³ *Mower v. Inhabitants of Leicester*, 9 Mass. 247 (1812).

⁴ "This rule of law, however, is of limited application. It is applied, in case of towns, only to the neglect or omission of a town to perform those duties which are imposed on all towns, without their corporate assent, and exclusively for public purposes; and not to the neglect of those obligations which a town incurs, when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred on it, at its request. In the latter cases, a town is subject to the same liabilities, for the neglect of those special duties, to which private corporations would be, if the same duties were imposed on the same authority were conferred on them — including their liability for the wrongful neglect as well as the wrongful acts of their officers and agents." Per Mr. Justice Metcalf in *Bigelow v. Randolph*, 14 Gray, 541, 543 (1860).

In *Mooney v. Edison Electric Illuminating Co.*, 185 Mass. 547 (1904),

At a very early period the legislature began the policy, which has since been consistently followed, of imposing upon towns the duty of keeping the public ways within their borders in such a state of repair as to make them reasonably safe and convenient for travellers, with their horses, teams and carriages, at all seasons.⁵ The liability to respond in damages for injuries caused by defects in a highway grew out of this statutory duty — having created the duty, the legislature foresaw also the necessity of making some provision to enforce its performance, and as an effective means toward this end it adopted the expedient, provided for in the above sections, of making the towns directly responsible to the person injured by reason of a failure to keep the highways in proper repair, or to his legal representatives in case of the death of the person so injured, in all cases where other special provision was not made.⁶

§ 46. **The Extent of the Liability.** — Since it is created entirely by statute and is based upon a duty imposed by statute, the general limitations of the liability may be, at least roughly, defined. On the one hand, it cannot be broadened by any agreement of the town, or of its officers, beyond the terms of the statute itself. Thus, a town cannot, by contracting to repair a portion of a highway that it is not bound by law to keep in repair, be made liable to a person who is injured by reason of a defect in such portion of the way.⁷

And, on the other hand, the liability cannot be narrowed by implication: only some special statutory provision can have such an effect. Thus, although the defect that caused

it was held that a cause of action against a town under this section for negligently permitting a street to remain charged with electricity could not be joined with a cause of action against other parties at common law for negligently allowing the street to become charged therewith. A declaration joining such causes of action is bad on demurrer.

⁵ The provisions upon this subject at present in force are contained in Rev. Laws, ch. 51, § 1.

⁶ For the history of the development of the statutes creating this liability, see note 1, *ante*.

See also Scanlan *v.* Boston, 140 Mass. 84 (1885).

⁷ Rouse *v.* Somerville, 130 Mass. 361 (1881). And see also Gay *v.* Cambridge, 128 Mass. 387 (1880).

the injury is within the location of a railroad, the town is still liable,⁸ in the absence of some special statutory provision that relieves it from the obligation to keep such portion of its highway in repair.⁹

It follows, therefore, that the statutory duty to repair furnishes, not alone the basis, but as well the measure, of this liability. It is not greater, nor less, but simply commensurate with the duty to keep the highways in repair: the duty to keep them in such repair that they may be "reasonably safe and convenient for travellers, with their horses, teams and carriages at all seasons."¹⁰

This statutory liability is not, consequently, absolute: the mere existence of a defect in the highway by reason of which a traveller suffers injury does not alone give rise to a cause of action. It must also be made to appear that the existence of that defect was due to negligence on the part of the town. Hence no liability under this statute can arise unless and until such negligence appears as an active element in the case. This principle is well illustrated by the recent case of *Martin v. Chelsea*,¹¹ where the plaintiff was injured by falling into an excavation between the tracks of a street railway while running between the rails to catch a car. It appeared that the earth from the excavation was heaped up on one side of the tracks; that a wooden horse with a sign "no passing through" was placed on the other side, between the

⁸ *Davis v. Leominster*, 1 Allen, 182 (1861); *Noyes v. Gardner*, 147 Mass. 505, 508 (1888).

⁹ *Scanlan v. Boston*, 140 Mass. 84 (1885).

¹⁰ See opinion of Chief Justice Bigelow in *Blodgett v. Boston*, 8 Allen, 237, 238 (1864).

In *Cronan v. Woburn*, 185 Mass. 91 (1904), it was held not to be necessary to aver in the declaration that the city was obliged to keep the highway in repair, "as this was a statutory obligation of which the court is bound to take judicial notice."

¹¹ 175 Mass. 516 (1900). The court in this case, speaking of the defendant town, says: "It had erected barriers with signs to show that the way was not open to public travel. It had a watchman on the spot night and day. What happened could not reasonably be expected to happen; and we see no ground on which it can fairly be said that there was any want of the "reasonable care and diligence" required by the Pub. Sta. ch. 52, § 18. [Rev. Laws, ch. 51, § 18.]

tracks and the sidewalk; that a similar horse was placed at the corner of the street, and a third one near the excavation; that there was a man stationed at the excavation day and night to guard it. The court held that there was no evidence of negligence on the part of the defendant town, and that therefore the plaintiff could not recover.

§ 47. The Extent of the Liability as affected by the Vehicle used by the Traveller. Bicycles. Automobiles. — The word "carriage" as used by the legislature in this statute is interpreted to mean a vehicle capable of carrying passengers or inanimate matter. Although it is conceded that the statute is not to be confined to the same kind of vehicles that were in use at the time when it was first enacted, it has been held that it should be confined to vehicles *eiusdem generis*, and that therefore it does not extend to bicycles.¹² It has consequently become the settled rule that towns are not obliged to keep their public ways in such a state of repair and smoothness that a traveller upon a bicycle can pass over them with assured safety.¹³

It does not follow from this rule, however, that a traveller upon a bicycle, who is injured by reason of a defect in the highway, cannot in any case recover damages from the town. The duty to maintain the highway in proper repair is enforced in his favor to the same extent as in favor of any traveller employing the usual modes of locomotion. Hence, if a bicycle rider is injured by reason of a defect, such as the lack of a guard rail on the approach of a bridge, for which a town would be liable in damages to a traveller on foot or in any vehicle of the usual kinds, the fact alone that he was at the time of the accident riding on a bicycle will not debar him from maintaining an action under this statute.¹⁴

¹² Richardson *v.* Danvers, 176 Mass. 413 (1900). "A bicycle is more properly a machine than a carriage." s. c.

¹³ Richardson *v.* Danvers, 176 Mass. 413 (1900); Kenny *v.* Ipswich, 178 Mass. 368 (1901). In this last case the court says at page 373: "It is plain that a road might be entirely unsuitable for the use of the plaintiff while so travelling, and yet be reasonably safe for him on foot or in a carriage of the kind included within the terms of the statute." Hence any other rule might impose an intolerable burden upon towns.

¹⁴ Spring *v.* Williamstown, 186 Mass. 479 (1904).

It has not yet been decided whether the use of automobiles as a means of travel upon the public ways imposes any greater burden upon towns relative to the care of their highways. At the present time the cases go no further than to hold that where a traveller in an automobile is injured by a defect that was dangerous to ordinary travel, such as an excavation in the highway, he is not precluded from recovering damages under this statute because of the nature of the vehicle in which he was riding at the time of the accident.¹⁵

§ 48. The Construction of the Statute.—The provisions of these sections of the statute are, in nature and effect, a species of penal legislation — imposing a penalty upon municipal corporations for the neglect of a public duty. It is considered by the court, therefore, that the legislature intended to put no greater burden upon them than the plain meaning of the language used indicates. In other words, the statute is construed strictly in favor of the defendant.

It follows that all the conditions which the terms of the act impose must be strictly fulfilled before an action can be maintained. Thus, where the statute requires notice of the accident to be given within a certain number of days, a plaintiff who gives it after the time fixed has elapsed cannot maintain his action, even though the town should waive a strict compliance with the provision.¹⁶ And again, where the statute gave an action to a person injured by a defect that had existed for twenty-four hours, a person injured by a defect that had existed for a less time cannot maintain an action.¹⁷

Moreover a plaintiff cannot sue for any other cause of action than that expressly set out in the statute, namely, for death, or for injury to person or property. The statute can-

¹⁵ *Baker v. Fall River*, 187 Mass. 53 (1904).

In this case, at page 56, the court says: "Plainly an automobile is a vehicle which can carry passengers or inanimate matter, and so is such a carriage as the decision in *Richardson v. Danvers*, 176 Mass. 413, 414, said that the Legislature had in view in the use of that word in the statute."

¹⁶ *Gay v. Cambridge*, 128 Mass. 387 (1880).

¹⁷ *Brady v. Lowell*, 3 Cush. 121 (1849).

not, therefore, be extended by construction so as to give an action to a husband for the loss of services of his wife who was injured by a defect in the highway, or for the medical or other expenses incurred in her cure;¹⁸ nor so as to permit a father to recover for the medical expenses incurred in consequence of an injury suffered by his minor child.¹⁹

§ 49. Action for Death and Personal Injury Independent.

— The right of action given by section seventeen of the statute is entirely independent of the right of action given by section eighteen. An action under each section may, therefore, proceed at the same time, on independent grounds, and for different purposes.²⁰

"IF A PERSON SUSTAINS BODILY INJURY OR DAMAGE IN HIS PROPERTY"

§ 50. Who is a Person within the Meaning of the Statute?

— The word "person" as here used is of broad significance, and includes every one, without regard to age or condition, who may have occasion to pass over the highway.²¹ An unborn infant, between four and five months advanced in foetal life, which was a part of the mother at the time of the accident, does not however come within this rule.²²

§ 51. The Person Injured must be making a Proper Use of the Highway. Who is a Traveller. The Motive for Travelling. — Towns are not bound to keep their highways reasonably safe and convenient for all purposes, but only for the purpose of travel. It is incumbent upon the plaintiff, therefore, to show that he was, at the time of his injury, using the highway for the purpose for which the town was obliged to keep it in repair: in the language of the statute, he must show that he was at that time a "traveller." Consequently an injury resulting while the plaintiff is making an improper or unauthorized use of the highway imposes no liability upon the

¹⁸ *Harwood v. Lowell*, 4 *Cush.* 310 (1849).

¹⁹ *Nestor v. Fall River*, 183 Mass. 265 (1903). "The statute provides for bodily injuries, and damage to property. And it has been held that damages are given only for direct injury to the person and to property."

²⁰ *Bowes v. Boston*, 155 Mass. 344, 349 (1892).

²¹ See *Hamilton v. Boston*, 14 Allen, 475, 483 (1867).

²² *Dietrich v. Northampton*, 138 Mass. 14 (1884).

town. Thus a person who is using the highway solely as a playground,²³ or solely for the convenience of his business,²⁴ cannot recover compensation under this statute. And a person who is a traveller may by his own voluntary act give up that position and lose his statutory right to damages. Thus, where a person descended into a catch basin below the surface of the street for the purpose of rescuing a child which had fallen therein, and in consequence of so doing sustained bodily injury, the court held that when she abandoned the use of the street for travel and passed from the surface of it, which alone was fitted and intended for travel, into the catch basin below, however laudable was her motive, she ceased to be a traveller and put herself in another relation to the town.²⁵

The word "traveller," however, is given a somewhat liberal interpretation. It does not necessarily include only those persons who were at the moment of the accident engaged simply and solely in passing from one point to another upon the highway. It may also include persons who were at that moment doing some other act. The test to be applied in order to determine whether or not the plaintiff was a traveller at the time when he was injured, so far as any test can be laid down, is, whether the acts of the plaintiff at the time of the accident were naturally incident to travel, and were consistent with an intention on his part to continue upon and over the highway for the usual and proper purposes of travel. Applying such a test as this, it has been held that the mere doing of an act in play, as stopping to clasp a post by the side of the path,²⁶ or playing tag while going along the street,²⁷ will not deprive the injured person of the character of a traveller. Nor will the mere stopping for a few minutes to watch other boys at play have such an effect;²⁸ nor, again,

²³ *Tighe v. Lowell*, 119 Mass. 472 (1876); *Lyons v. Brookline*, 119 Mass. 491 (1876); *Blodgett v. Boston*, 8 Allen, 237 (1864).

²⁴ *McDougall v. Salem*, 110 Mass. 21 (1872).

²⁵ *Kelley v. Boston*, 180 Mass. 233 (1902).

²⁶ *Gulline v. Lowell*, 144 Mass. 491 (1887).

²⁷ *Graham v. Boston*, 156 Mass. 75 (1892).

²⁸ *Bliss v. South Hadley*, 145 Mass. 91 (1887).

alighting from one's carriage and picking berries for a short time by the side of the road.²⁹ It is obvious in each of these cases that the acts of the plaintiff could reasonably be regarded as the natural and ordinary incidents of travel upon the highway, which interrupted his progress only incidentally and for a reasonable time.

Whether or not the plaintiff was a traveller is a question of fact for the jury to determine upon all the evidence,³⁰ unless the character of the plaintiff's acts at the time of his injury make it perfectly clear that he had then ceased to use the highway for the proper purposes of travel, in which case it becomes the duty of the court to take the cause from the jury.³¹

If a person is using the highway for the purpose of travel, it seems that his motive or object for travelling is not material in determining whether he is entitled to recover damages for an injury occasioned by a defect therein. "The highway is to be kept safe and convenient for all persons having occasion to pass over it, while engaged in any of the pursuits or duties of life"—whether of business, convenience, or pleasure.³² Hence it has been held that a person who is walking along the highway simply for the purpose of exercise is a traveller and as such is entitled to maintain an action under this section.³³

§ 52. When the Person injured is, at the Time of the Accident, in the Service of the Town.—It has not as yet been decided just how far, if at all, a town can avail itself of the defence of common employment when sued under this section by a person in its service to recover compensation for injuries suffered by reason of the defective condition of the highway.³⁴ It has been decided, however, that a member of

²⁹ Britton *v.* Cummington, 107 Mass. 347 (1871).

³⁰ Hunt *v.* Salem, 121 Mass. 294 (1876).

³¹ Stickney *v.* Salem, 3 Allen, 374 (1862).

³² See Blodgett *v.* Boston, 8 Allen, 237, 240 (1864).

³³ Hamilton *v.* Boston, 14 Allen, 475 (1867). But it has been held that a person injured by the breaking of a defective railing against which he was leaning while engaged in conversation, could not recover under this statute. Stickney *v.* Salem, 3 Allen, 374 (1862).

³⁴ See Eaton *v.* Woburn, 127 Mass. 270 (1878).

the police department was not a co-servant of members of the street department in any such sense as to prevent him from maintaining an action, if injured by a defect in the highway while engaged in the performance of the duties of his office.³⁵ And it has also been held that a surveyor of highways can recover damages in such a case, unless the defect that caused his injury was due to his own negligence.³⁶

§ 53. The Injured Person must be in the Exercise of Due Care. The Application of the Doctrine of Contributory Negligence. — The familiar common law doctrine of contributory negligence applies to actions against towns based upon this statute.³⁷ If, therefore, the plaintiff was negligent at the time of the accident and such negligence contributed in any degree to his injury, he is not entitled to recover, even though the highway was out of repair and that want of repair also contributed directly to the injury.³⁸ This is so, of course,

³⁵ Kimball *v.* Boston, 1 Allen, 417 (1861).

³⁶ Wood *v.* Waterville, 4 Mass. 422 (1808); s. c. 5 Mass. 204 (1809); Todd *v.* Rowley, 8 Allen, 51 (1864).

³⁷ Little *v.* Brockton, 123 Mass. 511 (1878); Woods *v.* Boston, 121 Mass. 337 (1876); Hunt *v.* Salem, 121 Mass. 294 (1876); Snow *v.* Provincetown, 120 Mass. 580 (1876); Hill *v.* Seekonk, 119 Mass. 85 (1875); Weare *v.* Fitchburg, 110 Mass. 334, 339 (1872); West *v.* Lynn, 110 Mass. 514, 519 (1872); Schoonmaker *v.* Wilbraham, 110 Mass. 134 (1872); Hinckley *v.* Barnstable, 109 Mass. 126 (1872); Britton *v.* Cummington, 107 Mass. 347 (1871); Pollard *v.* Woburn, 104 Mass. 84, 87 (1870); Blood *v.* Tyngsborough, 103 Mass. 509 (1870); Gilman *v.* Deerfield, 15 Gray, 577 (1860); Stevens *v.* Boxford, 10 Allen, 25 (1865); Wilson *v.* Charlestown, 8 Allen, 137 (1864); Horton *v.* Ipswich, 12 Cush. 488 (1853); Bly *v.* Haverhill, 110 Mass. 520 (1872); Adams *v.* Carlisle, 21 Pick. 146 (1838); Thompson *v.* Bridgewater, 7 Pick. 188 (1828).

³⁸ Fallon *v.* Boston, 3 Allen, 38 (1861). It was held in this case that however great may be the fault of the town in not keeping its ways safe and convenient for travel, as required by the general laws, a person could not recover for an injury if it was due to his own want of care.

In Packard *v.* New Bedford, 9 Allen, 200 (1864), the alleged defect was a gutter running obliquely across the highway. It was held that evidence tending to show that many similar gutters crossed highways in the same town and in near-by towns, was competent upon the question of the plaintiff's due care; if such gutters were common, he was bound to exercise ordinary care adapted to the existing state of things.

Where the plaintiff was injured upon a highway which was practically closed to public travel on account of changes in grade that were being made, he offered to show that some other people drove wagons over the

not because it was his own conduct that contributed to his injury, but because it was conduct to which some fault could be imputed that concurred in bringing about the accident. Hence, if the plaintiff's contributing act was entirely innocent, it will not destroy his right to recover damages under this statute.³⁹

The standard of care is the same under the statute as at common law, — the conduct of the ordinarily intelligent and prudent man under like circumstances.⁴⁰

This standard, of course, never varies. While it is true that greater care is required of a person travelling upon the highway in some cases than in others, the variance is in the circumstances, not in the standard of care. This standard requires that he shall use ordinary prudence both in the manner of his going and as to the condition of his equipment.

street. The court held that this evidence was not material. "There are always persons who take risks, if a short cut can be made, and who will go over a street even if it is obviously not open to public travel." *Compton v. Revere*, 179 Mass. 413, 415 (1901).

Where the sidewalk and street as far as the tracks of a street railway were obstructed, but the tracks themselves and the other side of the street were open, and the plaintiff, in order to pass the obstructed part, went out into the street and walked along the tracks till she sank into an unguarded trench, it was held that it could not be ruled as matter of law that she was not in the exercise of due care. *Hyde v. Boston*, 186 Mass. 115 (1904).

In *Harvey v. Malden*, 188 Mass. 133 (1905), it was held that a woman riding a bicycle on a street one-half of which was being excavated, who, on meeting a furniture wagon with an overhanging load, attempted to pass it on the side next to the excavation and found herself obliged to turn toward the excavation in order to avoid being struck and in consequence fell into the trench, was not in the exercise of due care.

³⁹ *Lund v. Tyngsboro*, 11 Cush. 563 (1853); *Pomeroy v. Westfield*, 154 Mass. 462 (1891).

⁴⁰ *Smith v. Smith*, 2 Pick. 621 (1824); *Lane v. Crombie*, 12 Pick. 177 (1831), as treated in *Palmer v. Andover*, 2 Cush. 600, 605 (1849); *McGuinness v. Worcester*, 160 Mass. 272 (1894).

In *McDonald v. Savoy*, 110 Mass. 49 (1872), in order to show that he was exercising due care at the time of the accident, the plaintiff offered to prove that he was commonly careful and skilful in driving his team. The court held this evidence not to be admissible, on the principle that when the precise act or omission of a person is proved, the question whether it is actionable negligence is to be decided by the character of that act or omission, and not by the character for care that the person may sustain.

Thus, if he is injured while driving, it is incumbent upon him to show not alone that he was driving with due care⁴¹ and skill,⁴² but also that he was "using a proper horse and vehicle, with a strong and suitable harness": a defect in any of these details due to negligence,⁴³ which contributes in any degree to his injury, will, of course, as effectually bar a recovery under this statute as carelessness in his management of the team.⁴⁴

"Bigelow *v.* Rutland, 4 *Cush.* 247 (1849). In this case it was held that the fact that the reins became crossed and that the horse was in consequence misguided was not negligence *per se*. "The reins may become crossed even in the hands of prudent and careful persons."

"It was held in Carville *v.* Westford, 163 Mass. 544, 557 (1895), that a jury might find that "when the off rear wheel of a four-horse wagon loaded with stone has been thrown into a gutter by passing over a stone upon the surface of a narrow, rounded, and icy roadway, at a point sixty-five feet from a culvert through which a brook crosses the roadway, the driver may in the exercise of due care attempt to pull the wagon back upon the usual path without unloading it, and may even continue his attempt until the wagon is overturned into the brook."

In Whitney *v.* Leominster, 136 Mass. 25 (1883), there was evidence tending to show that at the time of the accident the plaintiff was driving at a high rate of speed — fifteen miles per hour, one witness testified. As tending to show the capacity of the plaintiff's horse for speed and as bearing upon the probability of the testimony as to his actual speed at the time of the accident, the town was permitted to show that the horse had been driven on a race course at the rate of a mile in three minutes. The court held that, "as thus limited, the evidence was competent. The fact to be determined was undoubtedly the rate of speed at which the horse was driven at the time of the accident; but when the testimony showed a very high rate of speed, as bearing upon its reasonableness and probability, it was competent to show that he had a great capacity for speed, even if it might also be true that he was not then driven at his full speed."

"As to the effect of a defect in vehicle or harness due to pure accident, that contributes to the accident, see § 78, *post*.

Where the jury had been instructed that, "if the state of the horse's vision was such as to make it liable, when exposed to ordinary objects upon and along the highway, to become unmanageable through fear, by a driver of ordinary care and skill, and this condition of the horse's vision contributed to the accident, or that if the vision of the horse was so defective as to render him unsafe and unsuitable to drive on the highway, the plaintiffs could not recover," it was held that this instruction was all the case required. Wright *v.* Templeton, 132 Mass. 49, 51 (1882).

"Murdock *v.* Warwick, 4 Gray, 178, 180 (1855); Brackenridge *v.* Fitchburg, 145 Mass. 160 (1887); Horrigan *v.* Clarksburg, 150 Mass. 218 (1889).

In accordance with the rule as to the burden of proof that is followed by the Massachusetts court,⁴⁵ the plaintiff must, in order to recover for an injury suffered while travelling upon the highway, show by affirmative evidence that he was at the time of the accident in the exercise of due care.⁴⁶

If, upon a due consideration of all the facts and circumstances bearing upon the issue, and of the inferences that may legitimately be drawn from them, different minds might reasonably reach different conclusions, the question of the injured person's due care is one of fact to be determined by the jury.⁴⁷ And a jury is at liberty to infer that he was travelling with the care ordinarily used under the circumstances, if the evidence shows fully the manner in which the accident happened, and there is no evidence to show negligence on his part at the time of the injury.⁴⁸ But if from the undisputed facts bearing upon the issue, but one conclusion can reasonably be drawn, or if there is no direct evidence of his due care and the circumstances of the accident are not sufficiently disclosed to warrant an inference upon the subject, then the question may be decided by the court as matter of law.⁴⁹

⁴⁵ See *Lane v. Crombie*, 12 Pick. 177 (1831).

⁴⁶ *McDonald v. Savoy*, 110 Mass. 49 (1872); *Sawyer v. Newburyport*, 157 Mass. 430 (1892). This has been the rule since the practice act of 1851. *Hilton v. Boston*, 171 Mass. 478 (1898). For the rule before that act, see *May v. Princeton*, 11 Met. 442 (1846).

⁴⁷ At the time of the accident means both before and after its commencement. A plaintiff cannot in the exercise of due care "abandon herself to needless alarm or give up all proper control of the horse, in consequence of the peril to which she was exposed by the negligence of the defendants in omitting to keep their road in suitable repair. She was still bound to use such care as a person of ordinary prudence and discretion would exercise if placed in similar circumstances and exposed to a like danger, making due allowance for the alarm into which she and her companion were thrown by the occurrence of the accident." Chief Justice Bigelow in *Brooks v. Petersham*, 16 Gray, 181, 184 (1860).

⁴⁸ *Bigelow v. Rutland*, 4 Cush. 247 (1849); *Britton v. Cummington*, 107 Mass. 347 (1871); *Joyner v. Great Barrington*, 118 Mass. 463 (1875).

⁴⁹ *Lyman v. Hampshire*, 140 Mass. 311, 314 (1885).

⁵⁰ *Crafts v. Boston*, 109 Mass. 519, 521 (1872); *Wood v. Westport*, 185 Mass. 567 (1904).

§ 54. What the Person Injured had a Right to assume. — In the absence of anything that would suggest to the mind of a man of ordinary prudence a peril of travel, a person who is passing along the highway is not bound to anticipate danger, but has a right to assume that the town has made the way reasonably safe and convenient for public travel in the ordinary modes. And he may act upon this assumption not only while travelling by daylight but as well while travelling in the night.⁵⁰

A traveller is not bound, therefore, as matter of law, to give all his attention to the highway over which he is passing, nor to keep his eyes constantly fixed upon the pavement or road-bed, watching for defects;⁵¹ nor need he look far ahead for defects or obstructions.⁵² Hence if, while his attention is momentarily diverted, he steps into a hole or stumbles over an obstruction, the presence of which was not known to him, he is not necessarily, as matter of law, guilty of contributory negligence, and that, too, even though the accident happens in broad daylight.⁵³

No presumption as to the condition of the highway is permissible, it would seem, where there is actual knowledge. When, therefore, a traveller approaches a portion of the highway known by him to be defective, he cannot act upon the assumption that it is safe, but must, if he proceeds, exercise that care which his knowledge calls for.

§ 55. The Effect of Infancy upon the Care required of the Injured Person. — The law presumes that an infant of very tender years is not capable of exercising any degree of care for his own safety. Consequently personal contributory negligence cannot be attributed to a child so young as to be *non*

⁵⁰ Thompson *v.* Bridgewater, 7 Pick. 188 (1828); Lamb *v.* Worcester, 177 Mass. 82, 84 (1900).

⁵¹ Flynn *v.* Watertown, 173 Mass. 108 (1899); Lamb *v.* Worcester, 177 Mass. 82, 84 (1900).

In Leonard *v.* Boston, 183 Mass. 68 (1903), it was held that it could not be ruled, as matter of law, that a person was bound to stop on seeing a lantern on a barrier which extended over only a portion of the sidewalk; she might assume the remaining portion to be safe for travel.

⁵² Thompson *v.* Bridgewater, 7 Pick. 188 (1828).

⁵³ Woods *v.* Boston, 121 Mass. 337 (1876); Flynn *v.* Watertown, 173 Mass. 108 (1899).

sui juris. Such an infant may therefore maintain an action against a town under this statute for an injury due to a culpable defect in its highway, although his injury would not have happened but for his concurring act, and although that act, if done by a person *sui juris*, would bar the action, provided his parents or guardian were not also guilty of contributory negligence in their care for him.⁵⁴

When an infant has attained to sufficient age to be capable of exercising care and discretion for his own safety, the law does not expect of him that degree which it exacts from a person of full age, but only that degree which may fairly and reasonably be expected of a child of his age and capacity.⁵⁵

§ 56. The Effect of the Negligence of the Parents or Guardian of the Person Injured. Imputed Negligence.— When the injured person is an infant, it is not enough to satisfy the burden of proof upon the issue of due care, for him to show that he was too young to be capable of exercising care for himself. He must go farther and show that the persons in whose custody he was, whether parents or guardian, were not guilty of negligence in their care of him at the time of the accident. For the rule is now settled that contributory negligence on their part is imputable to him and will effectually debar him from recovering damages under this statute.⁵⁶

⁵⁴ *Grant v. Fitchburg*, 160 Mass. 16 (1893).

The law does not fix any exact time after which an infant shall cease to have the benefit of this presumption in his favor, although seven years is perhaps the commonly accepted age at which he is supposed to become *sui juris* and capable of exercising for himself some degree of care. In *Casey v. Malden*, 163 Mass. 507 (1895), the court said: "We assume, however, that a boy of average intelligence, between nine and ten years of age, may be trusted upon the street alone."

⁵⁵ *Dowd v. Chicopee*, 116 Mass. 93, 96 (1874).

In *Casey v. Malden*, 163 Mass. 507 (1895), the plaintiff, a boy between nine and ten years of age, of average intelligence, walked backward along the highway a distance of twenty-five or thirty feet, until he fell into an open and unguarded manhole. The court held that "the jury would not have been warranted in finding, upon the evidence, that the plaintiff was in the exercise of due care. The evidence was undisputed. The hole was in plain sight, if the plaintiff had looked. He voluntarily adopted a dangerous method of crossing a public street; and his injury was a natural consequence of his carelessness."

⁵⁶ *Grant v. Fitchburg*, 160 Mass. 16 (1893). In this case the infant, a

§ 57. The Effect of Travelling by the Injured Person in the Darkness of Night.—The duty of towns relative to their highways is to keep them in such a state of repair that they may be reasonably safe for ordinary travel not only in the daytime but also in the night time. Hence a traveller has a right to assume and to act upon the assumption, in the absence of knowledge to the contrary, that he may pass over the highway with reasonable safety, even though it be very dark. Travelling at night is not, therefore, negligence *per se*. While the fact of darkness may require a greater degree of care and caution on the part of the traveller, it is at best simply evidence to be considered by the jury in deciding whether or not due care under all the circumstances of the case was exercised.⁵⁷

Likewise the failure to carry a light to aid in avoiding defects or obstructions in the path while travelling in the dark is not negligence on the part of the traveller as matter of law, but is merely evidence upon the question for the consideration of the jury.⁵⁸

§ 58. The Effect of Knowledge, on the Part of the Injured Person, of the Existence of the Defect.—It is the general rule, now well settled, that the mere fact that a person knows of a defect in the highway, and yet with that knowledge attempts to pass over that highway and in so doing suffers child twenty months old, was killed while on the street unattended. The court says: "His absence from home unattended on the public street was *prima facie* evidence of negligence on the part of his mother, and there was no evidence in the case which tends to show a justification or excuse for her failure to look after him for fifteen minutes after she saw him at the gate."

The question whether or not a person who enters a private conveyance, with no authority to direct or control the movements of its driver, and with no reason to suspect the prudence or competency of that driver, becomes so far identified with him that his negligent driving will prevent the recovery of damages from the town, if it concurs with a culpable defect in the highway in occasioning an injury, has not yet, it appears, been decided in this state. It has been decided both ways by the courts of other states.

⁵⁷ *Kenny v. Ipswich*, 178 Mass. 368 (1901); *Wood v. Westport*, 185 Mass. 567, 571 (1904); *Spring v. Williamstown*, 186 Mass. 479 (1904).

⁵⁸ *Kenny v. Ipswich*, 178 Mass. 368 (1901); *Spring v. Williamstown*, 186 Mass. 479 (1904).

an injury by reason of such defect, is not of itself, as matter of law, conclusive of his right to recover damages under this statute. The circumstance of such knowledge is evidence, and doubtless evidence of great weight, for the consideration of the jury upon the issue of his due care. It is, however, always open to him to refute the inference they might draw from it by showing that, in view of all the circumstances of the case, and particularly in view of his knowledge of the condition of the highway, he exercised proper care in attempting to proceed over the defective part of the way.⁵⁹

Although a person may know of the existence of defective conditions in the highway, he is not on that account bound, as matter of law, to abandon travel upon that part of the highway and to seek a safer route.⁶⁰ He may proceed along the path usually travelled without subjecting himself to the charge of contributory negligence, if by the exercise of care proportioned to the known danger he may reasonably expect to avoid the defect.⁶⁰ And the fact that he forgot for the

⁵⁹ *Frost v. Waltham*, 12 Allen, 85 (1866); *Reed v. Northfield*, 13 Pick. 94 (1832); *Barton v. Springfield*, 110 Mass. 131 (1872); *Weare v. Fitchburg*, 110 Mass. 334 (1872); *George v. Haverhill*, 110 Mass. 506 (1872); *Parker v. Springfield*, 147 Mass. 391 (1888); *Kelly v. Blackstone*, 147 Mass. 448 (1888); *Norwood v. Somerville*, 159 Mass. 105 (1893); *Spring v. Williamstown*, 186 Mass. 479 (1904).

Where it appeared that the plaintiff was accustomed to pass over the place of the accident and was well acquainted with it, the judge told the jury that they should take these facts into consideration and to determine whether on account of them she ought to have used increased care or to have avoided the place altogether. This instruction was held to be in conformity with settled law. The court adds: "It would not follow that the plaintiff, though she was familiar with the place, knew or supposed the way to be defective, because the jury have found it to be so. Nor could the court say, as matter of law, that there was a defect of such a character as to require unusual care in passing the street. These things were rightly left to the jury, with the instruction that the care required in the plaintiff was such as the condition of the street and her knowledge of it made reasonable care under the circumstances." *Smith v. Lowell*, 6 Allen, 39 (1863).

The fact that a husband knew of a defect in the highway and had time to warn his wife thereof will not defeat her action when injured by that defect. *Street v. Holyoke*, 105 Mass. 82 (1870).

⁶⁰ *Gilbert v. Boston*, 139 Mass. 313 (1885); *Dipper v. Milford*, 167 Mass. 555 (1897).

"Although the driver knew the situation," says Mr. Justice Barker in

moment the existence of the defect,⁶¹ or failed rightly to locate it,⁶² is not necessarily conclusive against him if he suffers an injury.

The court will not, however, apply the general rule above stated, but will hold the traveller to be guilty of contributory negligence, as matter of law, if it appears that he, knowing the highway to be in a very dangerous condition, and having it in his power to avoid the danger by going around the defective spot, voluntarily and without necessity chose to go ahead and to take the chances of being injured.⁶³ A person cannot heedlessly and carelessly travel along a portion of the highway known to him to be so dangerous that men of ordinary care and prudence would not attempt to pass over it at their own risk, and still hold the town responsible for any injury that may result to him.⁶⁴ Where the evidence discloses a case of this kind, a ruling of the presiding judge that the plaintiff is not entitled to recover will be sustained.⁶⁵

§ 59. The Effect of Defective Vision of the Person Injured. Total Blindness.—Persons whose vision was always imperfect, and persons whose sight has become dimmed by age or injured by disease, are still entitled to use the public

Carville v. Westford, 163 Mass. 544, 557 (1895), “it cannot be said, as matter of law, that he was not warranted in driving over the road, which was in common use by others as well as by himself.”

⁶¹ *George v. Haverhill*, 110 Mass. 506, 513 (1872). The court in this case says: “It is not required, as matter of law, that the thoughts of the traveller shall be at all times fixed upon those defects in the road he travels, of which he may have knowledge.” But see *Hawks v. Northampton*, 121 Mass. 10 (1876).

⁶² *Blood v. Tyngsborough*, 103 Mass. 509 (1870).

⁶³ *Wilson v. Charlestown*, 8 Allen, 137 (1864); *Gilman v. Deerfield*, 15 Gray, 577 (1860), as explained in *Kelly v. Blackstone*, 147 Mass. 448 (1888); *Fox v. Chelsea*, 171 Mass. 297 (1898); *Compton v. Revere*, 179 Mass. 413 (1901).

This exception to the rule has been placed upon the ground that a person who pursues such a course is utterly reckless, exercising not the least possible degree of care in order to protect himself. *Gilman v. Deerfield*, 15 Gray, 577 (1860).

⁶⁴ *Compton v. Revere*, 179 Mass. 413 (1901); see also *Parker v. Springfield*, 147 Mass. 391, 395 (1888).

⁶⁵ *Wilson v. Charlestown*, 8 Allen, 137 (1864).

highways and to act upon the same assumption of safety as persons whose vision is perfect. Hence it is not negligence, as matter of law, for them to attempt to travel upon the highway unattended. The fact of defective vision is simply a circumstance to be considered by the jury, in connection with all the other circumstances of the case, in determining whether in attempting to use the highway at the time in question the injured person was exercising such reasonable care and caution as an ordinarily prudent man, laboring under a like infirmity, would exercise under similar circumstances.⁶⁶

It would seem that ordinarily the rule would be the same even though the traveller was totally blind;⁶⁷ such a case could hardly be distinguished in principle from one where the sight of things was wholly obscured by the darkness of night.⁶⁸

§ 60. **The Effect of the Intoxication of the Person Injured.**—If it appears that the injured person was intoxicated at the time of the accident, that is an important circumstance to be considered by the jury upon the question whether or not due care was exercised by him. But the fact of intoxication alone will not debar him from maintaining an action under this statute if he is injured by a culpable defect in the highway; it simply makes proper the exaction of a greater degree of care from him as he passes along the road.⁶⁹ He will therefore be entitled to recover compensation for his injury,⁷⁰ unless it appears that the degree of care which his condition demanded was not used, and that such neglect contributed to the accident.⁷⁰

⁶⁶ *Winn v. Lowell*, 1 Allen, 177 (1861); *Spring v. Williamstown*, 186 Mass. 479 (1904).

In *Winn v. Lowell*, 1 Allen, 177, 180 (1861), it was held that the town was entitled to have the jury instructed that if the "plaintiff was a person of poor sight, common prudence required of her greater care in walking upon the streets, and avoiding obstructions, than is required of persons of good sight."

⁶⁷ See *Neff v. Wellesley*, 148 Mass. 487, 495 (1889).

⁶⁸ See *Wood v. Westport*, 185 Mass. 567, 571 (1904).

⁶⁹ *Alger v. Lowell*, 3 Allen, 402, 406 (1862).

⁷⁰ *Loftus v. North Adams*, 160 Mass. 161 (1893). The court in this

§ 61. The Effect of Defective Powers of Locomotion of the Person Injured. **Rupture.** — Persons whose powers of locomotion are impaired have nevertheless a right to travel upon the public highways. The fact, therefore, that a person injured by a culpable defect in the highway was a cripple will not of itself defeat his right to recover damages under this statute, if he can satisfy the jury that he was at the time of the accident exercising care commensurate with his infirmity of locomotion.⁷¹

And likewise the fact that the injured person was at the time of the accident suffering from a rupture and was not wearing a truss is not conclusive evidence of a want of due care on his part; it is merely a circumstance, bearing upon that question, for the consideration of the jury.⁷²

§ 62. When the Injured Person is, at the Time of the Accident, acting in Violation of Statute Law or Town Ordinance. — The fact that a person was at the time of the accident acting in violation of some statute or of some municipal ordinance, is not alone, as matter of law, conclusive of his right to recover compensation for his injury from the town. It is simply competent evidence to be submitted to the jury upon the broad issue of due care⁷³ — evidence which leaves it still to be established that such violation of law or ordinance

case says: "The meaning of drunkenness being a contributing cause is that without drunkenness the injury would not have happened."

In *Edwards v. Worcester*, 172 Mass. 104, 105 (1898), it was held that "witnesses were rightly allowed to testify whether the plaintiff was intoxicated. It was not a matter of opinion, any more than questions of distance, size, color, weight, identity, age, and many other similar matters are." It was also held in this case that testimony relating to the habits of the injured person as to temperance and to his reputation for sobriety, which was offered by him as bearing upon the probability of his intoxication, was properly excluded.

⁷¹ See *Upham v. Boston*, 187 Mass. 220 (1905).

⁷² *Ryerson v. Abington*, 102 Mass. 526, 531 (1869).

⁷³ "If at the time of the accident she was doing an unlawful act, and that unlawful act contributed to cause the alleged injury, she was not in the exercise of that due care which she is obliged to prove in order to recover. The allegation of due care implies not only that the plaintiff was not negligent, but also that she was not acting in violation of law when the alleged injury occurred." Mr. Justice Endicott in *Tuttle v. Lawrence*, 119 Mass. 276, 278 (1876).

contributed to the injury. The important question in every case of this class is, thus, not simply whether the injured person was doing some unlawful act when injured, but whether he was at that time guilty of an offence against the law which contributed directly to his injury. It is therefore the settled rule that if the injured person's own unlawful act concurs in producing an accident upon the highway, he cannot maintain an action for damages under this statute.⁷⁴

§ 63. The Application of the Maxim Volenti non fit Injuria. — The doctrine expressed by this maxim has only a limited application to actions under this statute. To make

⁷⁴ For cases involving a violation of a city ordinance regulating the speed of vehicles, see *Heland v. Lowell*, 3 Allen, 407 (1862); *Tuttle v. Lawrence*, 119 Mass. 276 (1876). The rule is applied in these cases even though it does not appear that the plaintiff had any actual knowledge of the ordinance. *Heland v. Lowell*, 3 Allen, 407, 408 (1862).

It is within the discretion of the presiding judge to limit the inquiry as to the speed that the horse is capable of going. Hence no exception will lie, whether evidence relating thereto is rejected, *Tuttle v. Lawrence*, 119 Mass. 276, 278 (1876), or admitted, *Whitney v. Leominster*, 136 Mass. 25, 27 (1883).

For cases discussing a violation of the law of the road, Rev. Laws, ch. 54, see *Smith v. Conway*, 121 Mass. 216 (1878); *Damon v. Scituate*, 119 Mass. 66 (1875); *Kidder v. Dunstable*, 11 Gray, 342 (1858); *Smith v. Gardner*, 11 Gray, 418 (1858).

Where it appeared that a part of the highway was so obstructed as to leave two openings; that the opening on the left side of the highway was wider than the one on the right side; and that the plaintiff attempted to go through the opening at the right and was injured, it was held that the jury might properly be instructed to bear in mind the law of the road in considering the question of the plaintiff's due care, even though there was no other vehicle in sight and he might have turned to the left without disobeying the statute. *Baker v. Fall River*, 187 Mass. 53, 57 (1904).

For cases discussing a violation of the statute regulating the observance of the Lord's day, Pub. Sts., ch. 98, § 3 (repealed, Acts, 1887, ch. 391, § 4), see *Jones v. Andover*, 10 Allen, 18 (1865); *Bosworth v. Swansey*, 10 Met. 363 (1845). In these cases the violation of the statute was held to be necessarily a contributing cause to the accident, on the ground that it would not have happened but for the injured person's act of travelling on the Lord's day.

In this class of cases evidence of the plaintiff's unlawful act is admissible under an answer containing a general denial. "The averment in the declaration of the use of due care, and the denial of it in the answer, properly and distinctly put in issue the legality of the conduct of the party as contributing to the accident or injury which forms the groundwork of the action." *Jones v. Andover*, 10 Allen, 18, 20 (1865).

it applicable to such actions, it is not enough to show that the plaintiff was, at the time of the accident, intentionally exposing himself to the possibility of injury by travelling upon a highway which he knew to be defective.⁷⁵ It must also be taken into account that travel upon the public ways is a matter not merely of right, but usually also of necessity. What was the constraint or exigency by which the injured person was led to undertake the trip? Was it such as to affect his appreciation of the nature and degree of the danger arising from the existence of the defect, or to lead him to assume a risk that he would not take under ordinary circumstances? These considerations must largely affect the question whether the assumption of the risk was voluntary, and whether he was justified in exposing himself to a greater danger than he could prudently incur under ordinary circumstances.⁷⁶

But nevertheless, if a person, when the exigency of the case does not require it, voluntarily chooses to travel over a highway which he knows to be defective, understanding the danger of such a course, he will be held to have assumed the risk, and will be debarred from maintaining an action for damages against the town.⁷⁷

§ 64. The Person Injured must show either Bodily Injury or Damage in his Property. — The liability created by this statute is limited to bodily injuries and to damage to prop-

⁷⁵ See § 58, *ante*.

⁷⁶ *Pomeroy v. Westfield*, 154 Mass. 462 (1891). And see also *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155 (1891).

⁷⁷ *Wilson v. Charlestown*, 8 Allen, 137 (1864); *Gilman v. Deerfield*, 15 Gray, 577 (1860); *Compton v. Revere*, 179 Mass. 413 (1901).

In the case last cited, *Compton v. Revere*, it appeared that the grade of the highway where the accident happened was being changed and the surface was consequently in a very rough condition, the dirt lying as it had been dumped from the carts; that this condition of things had remained unchanged for several months; that the plaintiff who was familiar with the situation and might have reached his destination by another route, was injured while attempting to pass over this street in the daytime; the court held that the street was virtually closed to travel, and the plaintiff used it at his peril. This rule will not apply, it was held in *Sampson v. Boston*, 184 Mass. 46 (1903), where the evidence does not require a finding that the street was in fact closed to travel.

erty. It cannot be extended beyond these limits. Hence in order to recover compensation an injured person must show some injury to his person or some damage in his property sustained by reason of a culpable defect in the highway.⁷⁸

§ 65. **Bodily Injury. Mental Suffering.** — A person cannot maintain an action against a town under this statute for the risk and peril alone, — the mere mental suffering, — that he incurred by reason of an accident due to a defect in the highway. He must show some injury to the person. But if he has suffered a bodily injury, however small, and it was attended by mental suffering, that suffering is a part of the injury to the person within the meaning of the statute, and is to be considered in estimating his damages.⁷⁹

§ 66. **Damage in his Property. Special Damage Necessary.**
Title to the Property. Bailee. — In order to maintain an action under this section for an injury in his property caused by a defective condition of the highway, the person must show that the injury was peculiar to himself, and not common to, or shared by, the public generally. In the common language of the cases, he must show that he has sustained some special and peculiar damage in using the highway. And to constitute such special and peculiar damage, the injury suffered must differ in kind, and not merely in degree, from that to which all citizens are exposed. Hence the rule has become established that it affords no ground of action against a town under this statute that, by reason of a defective condition of the highway, a person was subjected to personal inconvenience or was delayed in his business or was turned back in his journey.⁸⁰

⁷⁸ *Nestor v. Fall River*, 183 Mass. 265, 267 (1903).

It has accordingly been decided that a town cannot be held liable under this statute for such damages as the loss of services, the expense of nursing or medical attendance, and the like which may result to a person because of injuries suffered by reason of defects in a highway by his wife, *Harwood v. Lowell*, 4 Cush. 310 (1849), or by his minor child, *Nestor v. Fall River*, 183 Mass. 265 (1903).

⁷⁹ *Canning v. Williamstown*, 1 Cush. 451 (1848).

⁸⁰ *Holman v. Townsend*, 13 Met. 297 (1847); *Smith v. Dedham*, 8 Cush. 522 (1851).

A person need not have the general title to the property damaged in order to maintain an action under this statute. Possession of the property as bailee, together with the assent of the general owner, gives a sufficient title.⁸¹

“BY REASON OF A DEFECT OR A WANT OF REPAIR”

§ 67. What constitutes a Defect in the Highway.—The duty resting upon towns relative to their highways, it is to be remembered, is to keep them in such repair as to be reasonably safe and convenient for travellers with their horses, teams and carriages at all seasons.⁸² In general terms, then,

⁸¹ *Johnson v. Holyoke*, 105 Mass. 80 (1870). In this case Mr. Justice Gray says: “A hirer or other bailee of chattels is entitled, by virtue of his possession, to maintain an action of tort for any injury to them. In such an action, brought with the express or implied consent of the general owner, full damages for the injury to the property may be recovered, and a judgment therein may be pleaded in bar of any like action afterwards brought either by the bailor or by the bailee. The extent of the bailee’s liability to his bailor, by virtue of the contract or relation between them, for the injury itself, or for the damages recovered therefor from a wrongdoer, and the difficulty, in the present case, of distinguishing between the damages recovered for the injury to the plaintiff’s person and those for the injury to the property, are matters to be adjusted between the bailor and bailee, and do not affect the grounds or the measure of the liability of a third party by whose unlawful act or neglect the property has been injured, where (as has been found by this verdict) no want of due care on the part of the plaintiff contributed to the injury.”

⁸² In *Rust v. Essex*, 182 Mass. 313, 314 (1902), Mr. Justice Barker says: “It is settled that those charged with the care of public ways are not required to attempt to keep them so smooth that a bicycle can go over them with assured safety, and that a road which is reasonably safe for travel of the ordinary kinds is not defective merely because not fit for use with bicycles.” Hence it was held in that case that the presence in the wrought path of a country road of a single stone which protruded to a height of six inches and was ten inches in width across the road and fifteen inches in length with the road, and which was not in the usual wheel track, though near it, leaving sixteen feet on one side free from an obstruction, would not justify a finding that the way was defective. “So placed, the stone would not be dangerous to travellers on foot, to equestrians, or to persons riding in ordinary vehicles. It is not the intention of the statute to require the removal of all such stones from the wrought way upon country roads.”

“The possibility of there being too much snow and water in the streets for a few days in the winter time is like the possibility of smooth ice, an

whatever in the state or condition of the highway renders travel in the ordinary modes unsafe or inconvenient is a defect or a want of repair in the highway within the meaning of this statute.⁸³ The state or condition of a highway that renders travel in the ordinary modes dangerous or inconvenient may consist of an obstruction in an otherwise safe road, such as a pile of stones⁸⁴ left in the way, or logs or lumber⁸⁵ near to or extending into the travelled path, or a post⁸⁶ or barriers⁸⁷ set up in the way; or it may consist of incident of the climate which it would be unreasonable to require the city to guard against except under circumstances of greater danger than the present." *Spillane v. Fitchburg*, 177 Mass. 87, 88 (1900). The circumstances of this case were: at the corner of the sidewalk there was a hole in the curbstone for an opening into the catch basin; in front of the opening was an iron plate, on the surface of the street and sloping to the hole; an accumulation of snow and water stood in the street at this point, up to the level of the sidewalk; the plaintiff, after dark, mistook the water for a continuation of the walk, stepped off the corner, slipped upon the iron plate, and fell. It was held that the facts disclosed no defect for which the city was responsible. The combination of the hole and the iron plate was proper; the snow and water by themselves were not a defect; and the combination of these elements, in connection with the darkness, would not make the city liable.

⁸³ See *Barber v. Roxbury*, 11 Allen, 318 (1865).

"In actions for injuries from defects in highways the question for the jury is whether the way was safe and convenient. The statute fixes this standard and no other test is given. It is to be applied with reference to the locality through which the road passes, the inevitable effects of climate, the season of the year, the nature and amount of travel to be accommodated, the expense and difficulty of constructing and maintaining the road, and such other considerations as may bear on the question what in that place constitutes a safe and convenient way. Perfect safety cannot be secured." Mr. Justice Colt in *Bodwell v. North Andover*, 110 Mass. 511 n. (1872).

In *Goldthwait v. East Bridgewater*, 5 Gray 61 (1855), it was held that no exception would lie to the refusal of the trial judge to rule that in order to maintain an action the defect must be of such a nature that the town would be liable to an indictment therefor.

⁸⁴ *Bigelow v. Weston*, 3 Pick. 267 (1825).

⁸⁵ *Snow v. Adams*, 1 Cush. 443 (1848); *McCarthy v. Dedham*, 188 Mass. 204 (1905).

⁸⁶ *Appleton v. Nantasket*, 121 Mass. 161 (1876); *Arey v. Newton*, 148 Mass. 598 (1889).

⁸⁷ *Pratt v. Amherst*, 140 Mass. 167 (1885).

"Inanimate objects resting upon the surface of a properly wrought way, if of a nature to endanger travel, have been held to make the way defective whether put in place by some agency of the municipality

an unfitness of the roadbed itself for ordinary travel, due to faulty construction,⁸⁸ or to ordinary wear,⁸⁹ or to any other

charged with the care of the way (*Bigelow v. Weston*, 3 Pick. 267; *Pratt v. Cohasset*, 177 Mass. 488) by an individual owner of the soil, (*Snow v. Adams*, 1 Cush. 443), or by one having some other qualified right in connection with the way, (*Hayes v. Hyde Park*, 153 Mass. 514). But if when the injury is done the obstacle which constitutes the defect is in use and the acts of persons who are using it contribute to or are the moving cause of the injury the statutory liability cannot be enforced." (*Barber v. Roxbury*, 11 Allen, 318; *Pratt v. Weymouth*, 147 Mass. 245.) Mr. Justice Barker in *Griffin v. Boston*, 182 Mass. 409 (1903).

⁸⁸ *Talbot v. Taunton*, 140 Mass. 552 (1886); *Lamb v. Worcester*, 177 Mass. 82 (1900).

So the improper filling of a trench dug in the street for the purpose of laying a drain may constitute a defect. *Bingham v. Boston*, 161 Mass. 3 (1894).

⁸⁹ *Cromarty v. Boston*, 127 Mass. 329 (1879).

It has been held that the following conditions may constitute a defect or a want of repair in the highway: an open iron box, about four inches square, let into the sidewalk near the curb, the top of the box being one inch higher than the walk, said box being a part of the usual apparatus put in and used by a gas company for distributing gas, *Loan v. Boston*, 106 Mass. 450 (1871); a shut-off box let into the middle of the sidewalk and projecting an inch and a quarter above the surrounding gravel, *Redford v. Woburn*, 176 Mass. 520 (1900); a hole in a culvert, covered with a flat stone and located near the line of travel, *Hodgkins v. Rockport*, 116 Mass. 573 (1875); a narrow rounded roadway, with a steep slope into a gutter and without a railing and covered in part with smooth ice, *Carville v. Westford*, 163 Mass. 544 (1895); the end of a crosswalk cut off during repairs and left somewhat elevated above the bottom of the gutter, *Flynn v. Watertown*, 173 Mass. 108 (1899); a plank which separated a gravel from a brick sidewalk and was raised one or more inches above the gravel but level with the bricks, *George v. Haverhill*, 110 Mass. 506 (1872); but not cobble stones six inches in height, supporting the edge of a concrete walk, their upper surface being on a level therewith, *Burke v. Fall River*, 187 Mass. 65 (1904); loose gravel spread upon the travelled path, which raised the part so treated above the level of the rest of the way, *Pratt v. Cohasset*, 177 Mass. 488 (1901); a part of a Hyatt light bulkhead which projected one and a half inches above the level of the surrounding walk, *Lamb v. Worcester*, 177 Mass. 82 (1900); the absence of a glass disk, two to two and five-eighths inches in diameter, from a Hyatt light, *Upham v. Boston*, 187 Mass. 220 (1905); a gravel heater with its handle held up by a rotten wire, which had been left unused by the side of the street for a week, *Griffin v. Boston*, 182 Mass. 409 (1903); a post hydrant so placed in the sidewalk that part would project beyond the curbstone, *Germain v. Fall River*, 177 Mass. 550 (1901).

In *Upham v. Boston*, 187 Mass. 220 (1905), the court declined to express any opinion upon the question whether a hole in the sidewalk so

cause. But in order to constitute a defect within the meaning of this statute, it is not necessary that the matter complained of should present such a condition of things as to endanger all modes of public travel upon the highway; "it is enough that it makes any mode dangerous which the public have a right to use." Thus, a post set in the highway so near to the street-railway tracks as to knock the conductor of a passing car from the running-board while he was collecting fares, was held to be a defect, although it might not render dangerous any other mode of travel.⁹⁰

The mere fact that the dangerous condition of the highway was concealed does not necessarily make such condition any the less a defect for which the town may be liable. The liability imposed by this statute covers all defective conditions within the travelled path, whether open and obvious or otherwise, provided that they are of such a nature that the town might discover and remedy them by the exercise of reasonable care and diligence.⁹¹

Whether or not the highway is defective, or is safe and small that it could endanger no travellers except those using crutches might be a defect.

Steps projecting into the street, built under a statute permitting them to so project, do not constitute a defect for which a town may be liable. *Cushing v. Boston*, 124 Mass. 434 (1878).

In *Butterfield v. Boston*, 148 Mass. 544 (1889), it appeared that the plaintiff approached a drawbridge just as the gateman was closing the gates; that he was allowed to pass through the gates, and as he drove on to the draw it was moved by the draw-tender and the plaintiff was thrown into the water; that the gates were suitable, the draw sufficient, and the persons managing them competent. It was held that the facts did not bring the case within the letter or the spirit of this statute. The plaintiff's injury was caused, not by any failure of the town to perform its duty, but by a momentary negligence of the gateman or draw-tender. The opening of the draw, though it made the street dangerous, was not a defect under the statute. The town was not responsible for the negligence of the gateman or draw-tender, and "it cannot be indirectly held liable, upon the theory that this negligence created a defect in the street which the city by reasonable diligence might have remedied."

⁹⁰ *Powers v. Boston*, 154 Mass. 60 (1891). If the obstruction is not so near the tracks as to render travelling upon the running-board dangerous, it is not a defect, even though the conductor may possibly come in contact with it. *Hall v. Wakefield*, 184 Mass. 147 (1903).

⁹¹ *Burt v. Boston*, 122 Mass. 223, 226 (1877); *McGaffigan v. Boston*, 149 Mass. 289 (1889); and see §§ 97, 108, *post*.

convenient for travel, is ordinarily a question of fact for the jury;⁹² but if the precise position and the characteristics of the alleged defect or want of repair are not matters of controversy, the court can determine the question as matter of law.⁹³

The fact that, in the opinion of those town officers who are charged with the duty of caring for the highways, the condition of things by reason of which a traveller is injured does not constitute a defect, is not at all material. The inquiry in every case is, not as to the belief of the town officers, but as to the actual fact, which, as noted above, it is ordinarily for the jury to find from all the circumstances of the case.⁹⁴

§ 68. A Failure to light the Highway as a Defect.— When towns have provided public ways that are in proper repair and suitably protected by railings, so as to be reasonably safe and convenient for travel in the ordinary modes, they have fulfilled their whole duty to the travelling public. In the absence of a statutory or charter provision making it obligatory so to do, they are not under any legal obligation to furnish lights. Hence the omission to illuminate their highways does not constitute a defect within the meaning of this statute.⁹⁵ And it has been held that the fact that there is a city ordinance requiring lights to be provided under certain circumstances will not alter this rule.⁹⁶

⁹² *Dowd v. Chicopee*, 116 Mass. 93 (1874); *Ghenn v. Provincetown*, 105 Mass. 313 (1870); *Brooks v. Somerville*, 106 Mass. 271 (1871); *Pratt v. Amherst*, 140 Mass. 167 (1885); *Spaulding v. Beverly*, 167 Mass. 149 (1896); *Harris v. Great Barrington*, 169 Mass. 271, 275 (1897).

⁹³ *Raymond v. Lowell*, 6 Cush. 524 (1850); *Macomber v. Taunton*, 100 Mass. 255 (1868). Speaking of the case first cited, the court says, in *Lamb v. Worcester*, 177 Mass. 82 (1900): "Moreover, though *Raymond v. Lowell* has been frequently cited and recently cited (see *Newton v. Worcester*, 174 Mass. 181, 188), it has also been questioned. *George v. Haverhill*, 110 Mass. 506, 511; *Marvin v. New Bedford*, 158 Mass. 464, 467, 468."

⁹⁴ *Hinckley v. Somerset*, 145 Mass. 326, 336 (1887).

⁹⁵ *Lyon v. Cambridge*, 136 Mass. 419 (1884); *Macomber v. Taunton*, 100 Mass. 255 (1868); *Sparhawk v. Salem*, 1 Allen, 30, 32 (1861).

⁹⁶ *Lyon v. Cambridge*, 136 Mass. 419 (1884).

Cases of this class are, of course, to be distinguished from those where there is some defect in the highway that ought to be properly guarded in the night time. In the latter cases the duty to furnish lights is plain, and the liability for any failure so to do, in consequence of which a traveller who is himself in the exercise of due care sustains an injury, must be equally plain.⁹⁷

§ 69. **Useful and Ornamental Things as Defects in the Highway.**— It is held that such useful things as hitching-posts⁹⁸ and posts set up to protect a sidewalk,⁹⁹ rightfully placed in the highway by the owner of the abutting premises, if properly located with relation to the width and general character of the highway, do not, at least as matter of law, constitute defects therein, even though travellers may be exposed to the danger of coming in contact with them. But when such things are not properly located, they may constitute defects in the highway which will render a town liable under this statute for injuries due to them.⁹⁹

Necessary things, such as telegraph poles,¹⁰⁰ watering troughs,¹⁰¹ and the like, and ornamental things, such as shade trees,¹⁰² duly located by the proper officials, acting under

⁹⁷ See *Leonard v. Boston*, 183 Mass. 68 (1903).

⁹⁸ *Macomber v. Taunton*, 100 Mass. 255 (1868).

⁹⁹ *Appleton v. Nantasket*, 121 Mass. 161 (1876).

¹⁰⁰ *Young v. Yarmouth*, 9 Gray, 386 (1857). But see Rev. Laws, ch. 122, § 15.

¹⁰¹ *Cushing v. Bedford*, 125 Mass. 526 (1878).

¹⁰² *Washburn v. Easton*, 172 Mass. 525 (1899). In this case Mr. Justice Hammond, at page 529, sums up the law relating to the liability of towns under this statute for injuries caused by shade trees set out under Rev. Laws, ch. 53, § 6, as follows: "1. The question whether a shade tree so set out is by reason of its locality dangerous to public travel, and for that reason should be removed, is a question over which the town has no control, but it is to be decided by the public tribunal duly appointed for that purpose (in this case the road commissioners), and the decision is not subject to review by a jury.

"2. This decision when made is until changed to be assumed as correct under the circumstances existing at the time it was made, and is to be taken as the authoritative declaration of the law that the tree so set out under such circumstances is not dangerous to public travel simply by reason of its locality; and in the absence of any subsequent physical change in the road, or in some other material respect, the town is justified in assuming that there is no duty to apply for a change in the

statutory authority, do not, by reason alone of their location, constitute defects in the highway within the meaning of this statute, so long as no subsequent material change is made in the highway.¹⁰³ If, however, such things are allowed to remain after they have become dangerous to travellers by reason of their condition, or if some subsequent material change is made in the highway which would render them dangerous to travellers by reason of their location, they may become defects for which the town may be held liable. Thus it has been held that where a shade tree had become decayed and because of its condition, which had continued for so long a time that the town ought to have known of it, was blown over upon the plaintiff, he was entitled to recover compensation for the injury sustained.¹⁰⁴

§ 70. Unguarded Excavations as Defects in the Highway.—The rule is settled that holes or excavations not properly guarded, whether within the travelled part or so near thereto as to render travel on such part dangerous, decision. But should there be any such subsequent material change, the questions whether the tree is thereby made dangerous, and whether it is the duty of the town to provide against such danger, either by application for a change in the location, or otherwise, may be submitted to a jury.

"3. The question decided by the public authorities under the statute being whether the public travel is incommoded or endangered by the locality of the tree in a natural healthy state, and not whether the tree is dangerous by reason of its decayed condition and consequent liability to fall, the questions whether a tree is dangerous from such a liability, and whether the town has used due care to protect the public travel from it when thus dangerous, are always questions which may be submitted to a jury."

¹⁰³ In *Young v. Yarmouth*, 9 Gray, 386, 390 (1857), Mr. Justice Dewey says: "The town cannot interfere and remove them; and their existence upon the highway, if in exact conformity with the regulations prescribed by the selectmen, does not constitute any defect or want of repair in the highway, for which the town can be held responsible in case of any injury thereby occasioned to any person travelling on such highway. If an improper location of telegraph posts has been allowed by the selectmen, the power is fully vested in the selectmen of the town to direct an alteration in such location, and thus obviate any inconveniences that may be found to exist to the traveller or the public generally. But this is not a matter which the town in its corporate capacity can regulate, or for which the town is responsible." But see *Rev. Laws*, ch. 122, § 15.

¹⁰⁴ *Chase v. Lowell*, 151 Mass. 422 (1890); s. c. 149 Mass. 85 (1889).

constitute defects in the highway.¹⁰⁵ In the application of this rule it makes no difference whether such holes or excavations were made by the town itself, or by some third person, or by the action of the elements: in each case the liability of the town is the same, provided it knew, or by the exercise of proper care and diligence might have known, of their existence without proper guards in time to have prevented the accident.¹⁰⁶

§ 71. **Insecure Projections as Defects in the Highway.**— Although all the decisions upon this subject are perhaps not easily reconciled, the rule appears to be considered as settled that a structure, erected by an owner of abutting premises over the sidewalk, which is so insecure and defective as to be likely to fall, is a defect in the highway for which a person injured by its fall may recover compensation from the town, provided that such structure can fairly be considered, not as a mere incident of the building to which it is attached, but as in some sense related to, and a part of, the sidewalk itself.¹⁰⁷ The awning cases are the typical exemplifications of this rule.¹⁰⁸ It has been extended, however, so as to include the case of a temporary transparency, fastened at one end to a building and supported at the other end by a pole resting on the sidewalk, which was put up in such an insecure manner as to fall upon and injure the plaintiff.¹⁰⁹ But a sign insecurely hung out over the highway from the

¹⁰⁵ *Doherty v. Waltham*, 4 Gray, 596 (1855); *Myers v. Springfield*, 112 Mass. 489 (1873).

¹⁰⁶ *Drake v. Lowell*, 13 Met. 292 (1847); *Day v. Milford*, 5 Allen, 98 (1862); *Jones v. Boston*, 104 Mass. 75 (1870); *Pratt v. Weymouth*, 147 Mass. 245, 251 (1888), *semble*.

¹⁰⁷ *Drake v. Lowell*, 13 Met. 292 (1847); *Day v. Milford*, 5 Allen, 98 (1862).

“These decisions were put exclusively on the ground of the insufficient strength or defective condition of structures which were not mere incidents or attachments of the building, but were adapted to the sidewalk, and were a part of its construction and arrangement for use as such. It was deemed that danger from their insecure condition might properly be treated as arising from a defective or unsafe condition of the sidewalk.” Mr. Justice Devens in *Pratt v. Weymouth*, 147 Mass. 245, 251 (1888).

¹⁰⁸ *West v. Lynn*, 110 Mass. 514 (1872).

abutting premises to which alone it was attached by means of an iron support has been held not to constitute a defect in the way.¹⁰⁹ A similar decision was reached in the case of snow and ice which projected over the sidewalk from the roof of an adjoining building.¹¹⁰ The distinction between these latter decisions and the awning cases has been stated by Mr. Justice Wells, in *Jones v. Boston*,¹⁰⁹ to be that "the awning differs from the overhanging sign, or ice, in that it is not a mere incident or attachment of the building alone, but is a structure erected with reference, in part at least, to the use of the sidewalk as such. The structure itself, being adapted to the sidewalk, in some measure, as a part of its construction and arrangement for use as a sidewalk, a danger from its insecure condition may reasonably be treated as arising from a defective or unsafe condition of the sidewalk."

The indications are that the tendency in this class of cases is to restrict, rather than to extend, the field for the application of this rule, and it has been often said that the awning cases express the extreme limit in this direction.¹¹¹

§ 72. An Illegal Use of the Highway as a Defect therein. — The duty of towns to maintain their highways in a reasonably safe condition for ordinary travel is performed when the roadbed is kept reasonably smooth and free from obstructions, and is properly protected by railings. Hence the principle has become established that "an illegal use of the highway by men, animals, vehicles, engines or any other object, while movable and actually being moved by human will and direction, and neither fixed to, nor resting on, nor remaining in one position within the travelled part of the highway," is not a defect or a want of repair for which a town is liable.¹¹² Thus, a derrick rope, which was stretched across the highway and attached at either end to objects outside the highway, and which did not remain in one posi-

¹⁰⁹ *Jones v. Boston*, 104 Mass. 75 (1870).

¹¹⁰ *Hixon v. Lowell*, 13 Gray, 59 (1859).

¹¹¹ See *Pratt v. Weymouth*, 147 Mass. 245, 251, 252 (1888).

¹¹² *Barber v. Roxbury*, 11 Allen, 318 (1865); *Vinal v. Dorchester*, 7 Gray, 421 (1856); *Pierce v. New Bedford*, 129 Mass. 534 (1880); *Shepherd v. Chelsea*, 4 Allen, 113 (1862).

tion but was raised and lowered by the workmen in the course of the work, is not a defect in the highway for which a town is liable to a person injured by being brought in contact therewith while it was being raised.¹¹³ And so also a boy coasting in the highway upon a hand sled does not constitute a defect upon which a plaintiff who is struck and injured by the moving sled can base an action under this statute to recover compensation from the town.¹¹⁴

§ 73. Objects that cause Horses to take Fright as Defects in the Highway. — The doctrine has become well established that an object with which a traveller does not come into contact does not constitute a defect in the highway within the meaning of this statute, for the sole reason that it is of such a nature as to cause his horse to take fright.¹¹⁵ In the application of this doctrine, it makes no difference whether the object that causes the fright be outside the travelled part, as in *Keith v. Easton*,¹¹⁶ or within the travelled part, as in *Kingsbury v. Dedham*;¹¹⁷ nor yet whether the fright is caused from sight,—the visible appearance of the object,—as in *Cook v. Montague*,¹¹⁸ or from sound, as in *Bowes v. Boston*;¹¹⁹ nor if from sound, whether that sound was produced by third persons outside the limits of the highway,¹²⁰ or by the vehicle itself touching as it passed an object in the highway;¹²¹ nor again whether the object that causes the fright constitutes in itself an actual defect in the highway, as in *Cook v. Charlestown*,¹²² or does not in itself constitute a defect, as in *Cook v. Montague*;¹¹⁸ in each of these cases no liability attaches to the town. But even under this doc-

¹¹³ *Barber v. Roxbury*, 11 Allen, 318 (1865).

¹¹⁴ *Pierce v. New Bedford*, 129 Mass. 534 (1880); *Shepherd v. Chelsea, 4 Allen*, 113 (1862).

¹¹⁵ *Cook v. Charlestown*, 98 Mass. 80 (1867); *Bemis v. Arlington*, 114 Mass. 507, 509 (1874); *Cook v. Montague*, 115 Mass. 571 (1874); *Brooks v. Acton*, 117 Mass. 204, 210 (1875).

¹¹⁶ 2 Allen, 552 (1861).

¹¹⁷ 13 Allen, 186 (1866).

¹¹⁸ 115 Mass. 571 (1874).

¹¹⁹ 155 Mass. 344, 350 (1892).

¹²⁰ *Lincoln v. Boston*, 148 Mass. 578 (1889).

¹²¹ 13 Allen, 190, n. (1866); s. c. 98 Mass. 80 (1867).

trine, if his horse is frightened by one object and in consequence he is brought in contact with another object which is a defect in the highway and is injured thereby, the traveller may recover for the injury so suffered.¹²²

§ 74. Snow and Ice as a Defect in the Highway. — Prior to 1896 the law, while exacting from towns the same degree of diligence in removing from their highways obstructions occasioned by snow or ice as in removing any other obstruction, recognized the fact that the circumstances under which the diligence was to be exercised were oftentimes very exceptional; that in our rigorous climate a smooth coating of ice, which it was practically impossible to remove, was likely to form upon the sidewalks quickly and often during the winter season.

Influenced largely by considerations of this kind, the rule was established that the bare fact that a highway which was properly constructed and of no unusual slope had become slippery by reason of the existence of a coating of ice which presented a smooth and polished surface, over which it was difficult to pass without being exposed to the danger of a fall, did not constitute a defect for which a town was liable under this statute.¹²³ If, however, such smooth coating of ice formed upon the highway because of the improper construction or of the defective condition of the highway itself,¹²⁴ or because of the negligence of the town to properly care for the conductors,¹²⁵ catch-basins,¹²⁶ and the like, there might be a defect for which the town could be made to respond in dam-

¹²² *Bigelow v. Weston*, 3 Pick. 267 (1825); *Bly v. Haverhill*, 110 Mass. 520 (1872); *Woods v. Groton*, 111 Mass. 357 (1873); *Cushing v. Bedford*, 125 Mass. 526 (1878).

¹²³ *Stanton v. Springfield*, 12 Allen, 566 (1866); *Hutchins v. Boston*, 12 Allen, 571, n. (1866); *Johnson v. Lowell*, 12 Allen, 572, n. (1866); *Nason v. Boston*, 14 Allen, 508 (1867); *Gilbert v. Roxbury*, 100 Mass. 185 (1868); *Billings v. Worcester*, 102 Mass. 329 (1869); *Pinkham v. Topsfield*, 104 Mass. 78, 83 (1870).

¹²⁴ *Fitzgerald v. Woburn*, 109 Mass. 204 (1872); *Adams v. Chicopee*, 147 Mass. 440 (1888); *Spellman v. Chicopee*, 131 Mass. 443 (1881); *McGowan v. Boston*, 170 Mass. 384 (1898).

¹²⁵ *McGowan v. Boston*, 170 Mass. 384 (1898).

¹²⁶ *Hall v. Lowell*, 10 Cush. 260 (1852).

ages to a traveller who sustains an injury by a fall upon such ice.

It was also the well-settled rule prior to 1896 that if the snow or ice, instead of presenting a smooth and level surface, had accumulated in ridges, or had assumed a rough and uneven condition or such shape as to be in some sense a real obstruction to travel, either by reason of drifting, or of the repeated flowing and freezing of water, or of the passing to and fro of travellers, or from any other cause, it was a defect within the meaning of this statute; and the fact that it was also slippery did not make it the less a defect.¹²⁷

In 1896 the legislature materially changed all of these rules of law by enacting the following provisions:¹²⁸

"A county, city or town shall not be liable for an injury or damage sustained upon a way, causeway or bridge by reason of snow or ice thereon, if the place at which the injury or damage was sustained was at the time of the accident otherwise reasonably safe and convenient for travellers."

As modified by this statutory provision, the law now is that snow or ice alone does not constitute a defect in the highway;¹²⁹ nor does snow or ice in connection with some defect in the highway, which defect operates simply to cause the snow or ice to accumulate.¹³⁰ But snow or ice in connection with some defect in the highway, which defect op-

¹²⁷ *Stone v. Hubbardston*, 100 Mass. 49 (1868); *Luther v. Worcester*, 97 Mass. 268 (1867); *Morse v. Boston*, 109 Mass. 446 (1872); *McAuley v. Boston*, 113 Mass. 503 (1873); *Williams v. Lawrence*, 113 Mass. 506, n. (1873).

In *Street v. Holyoke*, 105 Mass. 82, 85 (1870), it was held that the fact that a light snow was falling at the time of the accident, which concealed the ridge of ice and made it more dangerous, had legitimate bearing only upon the question of the plaintiff's due care.

¹²⁸ Acts, 1896, ch. 540, § 1, re-enacted in Rev. Laws, ch. 51, § 19.

¹²⁹ "The effect of the statute was to change the law as to liability for defects arising from ice or snow, so far as to create an exemption from such liability in cases where the ice or snow is the sole proximate cause of the accident." Mr. Justice Hammond in *Newton v. Worcester*, 174 Mass. 181, 187 (1899).

¹³⁰ *Newton v. Worcester*, 174 Mass. 181 (1899); s. c. 169 Mass. 516 (1897). Here the defect in the highway was simply a depression in the surface of the sidewalk which served to accumulate the ice upon which the plaintiff slipped.

erates as a contributing cause to the accident, may still be a defect within the meaning of this statute.¹⁸¹ In these cases "the real question is not simply whether the way with no snow or ice upon it is defective, but whether, if there be such a defect, it was operative as such at the time of the accident, and was in part the proximate cause of it. If there be such an operative defect, then there may be a liability even although the accident be due in part to ice or snow."¹⁸² Thus, where the plaintiff slipped upon a ridge or mound of earth covered with snow and ice, it was held that she might recover damages for the injury sustained.¹⁸³

¹⁸¹ *Bailey v. Cambridge*, 174 Mass. 188 (1899), and see also *Newton v. Worcester*, 174 Mass. 181 (1899).

¹⁸² Mr. Justice Hammond in *Newton v. Worcester*, 174 Mass. 181, 187 (1899). The court also says, at page 187: "We think the proper and only reasonable interpretation of the statute is, that wherever ice or snow is the sole proximate cause of the accident, there shall be no liability, but where at the time of the accident there is any other defect to which as a proximate cause the accident is in part attributable, there may be a liability notwithstanding the fact that it also may be attributable in part to ice or snow. This other defect, however, is not a proximate cause within the meaning of this rule, simply because it causes the accumulation of the ice or snow. In considering whether, 'at the time of the accident the way is otherwise reasonably safe and convenient,' the attention is to be directed to the actual physical condition of the way for the purpose of ascertaining whether there is at that time any other danger to the steps of the traveller than that arising from the presence of ice or snow. If there be no other danger, then for the time being the way is 'otherwise reasonably safe and convenient.'"

¹⁸³ *Bailey v. Cambridge*, 174 Mass. 188 (1899).

"The decisive test is not merely whether the way without any ice or snow upon it is defective, but whether, 'at the time of the accident, there is any defect other than ice or snow operating as such to which the accident is in part attributable. Under this interpretation the change made in the law is not only of a territorial but of a causal nature. It is not only necessary to show that there was a defect at the time of the accident, but that that defect was operative in part to produce the accident.' *Newton v. Worcester*, 174 Mass. 181, 186 (1899). "The question in these cases is not whether the accident would have happened if the ground had been bare, but whether, there being a defect in the bare ground, the accident was due wholly or in part to such defect as an operating cause." *Bailey v. Cambridge*, 174 Mass. 188, 197 (1899). "Whether the way when bare was defective, and whether the accident was wholly or partly caused by this defect, were questions for the jury." *Bailey v. Cambridge*, 174 Mass. 188, 197 (1899).

This statute relating to snow and ice as a defect in the highway

§ 75. The Cause of the Defect in the Highway.—The essence of the liability created by this statute is for not abating a dangerous condition which may exist in the highway. Therefore, what was the cause of that dangerous condition is of itself usually a matter of very little consequence. Indeed, it may be created by the town itself,¹³⁴ or by third persons,¹³⁵ or by the action of the elements,¹³⁶ or by ordinary wear,¹³⁷ or by any other conceivable cause, and in each case the town may be liable to any person injured by reason of its existence, provided the town knew, or by the exercise of proper care and diligence might have known, of it in time to have remedied it before the accident happened.

Under this rule, the fact alone that the town had no control over the cause that produced the defect, and could not prevent its operation, affords no defence;¹³⁸ if it might have discovered and remedied the defect by the exercise of reason-

applies only to the liability of towns, and hence cannot serve as a defence to an action against a landowner for a nuisance consisting of ridges of ice on the sidewalk adjoining his building. *Shipley v. Proctor*, 177 Mass. 498 (1901).

¹³⁴ *Pratt v. Amherst*, 140 Mass. 167 (1885).

¹³⁵ *Snow v. Adams*, 1 Cush. 443 (1848); *Loan v. Boston*, 106 Mass. 450 (1871).

Where a traveller is injured by reason of a defect in a highway that was due to the negligence or misconduct of a third party, while both the town and the third party may be liable, they are not *in pari delicto*. *Lowell v. Boston & Lowell Railroad*, 23 Pick. 24, 31 (1834). Therefore, if in such a case a town is compelled to pay damages, it is entitled to recover from such third party the amount so paid, at least to the extent of single damages. *Lowell v. Boston & Lowell Railroad*, 23 Pick. 24 (1834); *Lowell v. Short*, 4 Cush. 275 (1849); *Lowell v. Spaulding*, 4 Cush. 277 (1849); *Stoughton v. Porter*, 13 Allen, 191 (1866); *Cambridge v. Hanscom*, 186 Mass. 54 (1904). But the question whether or not such third party is liable over to the town is not material, so far as the right of the traveller to recover from the town is concerned. *Purple v. Greenfield*, 138 Mass. 1 (1884).

As to the right of the town in such a case to recover the costs of the former action, see *Lowell v. Boston & Lowell Railroad*, *ubi supra*. See also Rev. Laws, ch. 111, § 264.

As to the liability over of gas companies, see Rev. Laws, ch. 110, § 77. And of electric light companies, see Rev. Laws, ch. 121, § 18.

¹³⁶ *Street v. Holyoke*, 105 Mass. 82 (1870).

¹³⁷ *Cromarty v. Boston*, 127 Mass. 329, 331 (1879).

¹³⁸ See *Billings v. Worcester*, 102 Mass. 329, 332 (1869).

able care and diligence, it is still liable. But if it appears that the defective condition was one which the town had neither the power nor the right to remedy, the town is not liable: the liability is only coextensive with the right and duty to repair.¹³⁹ Thus the narrowness and crookedness of a highway, due to the manner in which it was laid out by the county commissioners, though they may constitute a defect, will not render the town liable to a person injured in consequence thereof, since it had no right to go outside of the limits defined by the location in order to make the highway more safe and convenient.¹⁴⁰

§ 76. The Location of the Defect in the Highway. It must be in the Travelled Part.—The duty to maintain their highways in such condition that they may be reasonably safe and convenient for travel in the ordinary modes, does not necessarily require that towns should prepare for travel the whole road from one boundary to the other.¹⁴¹ A wrought part that is reasonably suited to the travel at the particular place will satisfy the requirements of the statute. It follows, therefore, that a town is liable under this statute, as a general rule, only for injuries sustained by reason of defects that exist in that part of the highway which is wrought and used for travel. Hence if a traveller, without any necessity for such action, for his own pleasure or convenience, departs from the wrought track, he does so at his peril and cannot hold the town responsible for any accident that may happen

¹³⁹ *Jones v. Waltham*, 4 *Cush.* 299 (1849); *Smith v. Wakefield*, 105 Mass. 473 (1870); and see *Flanders v. Norwood*, 141 Mass. 17 (1886).

¹⁴⁰ *Smith v. Wakefield*, 105 Mass. 473 (1870).

¹⁴¹ See § 94, *post*.

"The duty of cities and towns to keep their streets and highways safe and convenient extends certainly to that part wrought for travel, both of the street and sidewalk, and protects alike the travellers who pass along it, and those who have occasion to pass across it in order to reach adjoining premises; not that all parts of all highways shall be kept in like repair, and alike smooth and free from obstruction, but that all parts of all highways shall be kept in such a condition as shall be deemed reasonably safe and convenient, having reference to the character of the way and the amount of travel over it." Mr. Justice Colt in *Street v. Holyoke*, 105 Mass. 82, 84 (1870).

to him by reason of a defect outside the travelled part.¹⁴² And in the application of this rule it makes no difference whether the operative defect was within or without the limits of the highway as located, provided it was outside the travelled part.¹⁴³

This general rule of law is, however, subject to several exceptions. Thus, although injured by a defect outside the travelled part, a person may still be entitled to recover compensation for his injury if he can show that the dangerous

¹⁴² Howard *v.* North Bridgewater, 16 Pick. 189 (1834); Smith *v.* Wendell, 7 Cush. 498 (1851); Carey *v.* Hubbardston, 172 Mass. 106 (1898); Felch *v.* West Brookfield, 184 Mass. 309 (1903); Lynch *v.* Boston, 186 Mass. 148 (1904).

In Felch *v.* West Brookfield, 184 Mass. 309 (1903), it appeared that the plaintiff was injured by driving off a bridge which had been constructed across a gutter, solely for the purpose of facilitating access between the travelled part of the highway and a private driveway which opened into the highway, it was held that since the defect was outside the travelled part, the general rule of non-liability applied and the plaintiff could not recover. In Kellogg *v.* Northampton, 8 Gray, 504 (1857), the facts were similar, but it was found that the culvert had been adopted and incorporated as a part of the highway, wrought, intended, and used for public travel at the time of the accident, and consequently the town was held liable.

Where the plaintiff was injured by stumbling over a grade stake which stood about two feet inside of the line of the location of the highway but outside of the wrought part, and was situated near a white post that was a stopping place of an electric car line, it was held to be a question for the jury whether in view of the amount and character of the public travel in that vicinity the way was reasonably safe and convenient or by reason of the existence of the stake was defective. Stanford *v.* Hyde Park, 185 Mass. 253 (1904). In a note to Lynch *v.* Boston, 186 Mass. 148 (1904), the reporter says: "In Stanford *v.* Hyde Park, 185 Mass. 253, the stake although outside of the wrought roadway must have been found to be within the portion of the highway used for public travel on foot by persons passing to and from the electric cars."

Where the plaintiff was injured while passing over a strip of land taken for the purpose of widening the street, in order to reach the travelled part, which strip was still rough and not completely fitted for public travel, the general rule of non-liability was applied and it was held that he could not recover. Lynch *v.* Boston, 186 Mass. 148 (1904).

By the "travelled part" of the road is intended that part which is usually wrought for travel, and not any track which may happen to be made in the road by the passing of vehicles. Clark *v.* Commonwealth, 4 Pick. 125 (1826).

¹⁴³ Stockwell *v.* Fitchburg, 110 Mass. 305 (1872).

spot was so near to the wrought part as to render travel upon that part unsafe.¹⁴⁴ In cases of this class it is usually a question of fact for the jury whether the dangerous spot was in such close proximity to the prepared part as to make travel thereon dangerous.¹⁴⁵

So also a traveller may leave the travelled part of the highway and still retain the right to maintain an action under this statute if an accident happens while he is outside such part where the deviation is made necessary because the wrought portion is obstructed or otherwise unsafe for use.¹⁴⁶

Again, if a traveller can show that a path has for a long time been used for public travel, and that there was nothing to indicate that such use was unauthorized, he may recover for injuries due to defects in such path, although the town has taken no steps to fit it for public travel.¹⁴⁷ "A side of a street may be in such form, and so used, with the knowledge and acquiescence of a town, as to be a portion of the travelled part of the way, which the town is bound to keep in repair, even though no work has been done upon it to fit it for the use of pedestrians."¹⁴⁸

And finally, a person may maintain an action if he can show that the limits of the highway were not indicated by any visible objects which would show the course intended for travel, and that the defect which caused the injury, though outside the wrought part, was within the general course and direction of travel.¹⁴⁹

¹⁴⁴ *Snow v. Adams*, 1 *Cush.* 443 (1848); *Arey v. Newton*, 148 *Mass.* 598 (1889).

¹⁴⁵ *Warner v. Holyoke*, 112 *Mass.* 362 (1873).

The case does not come within this exception to the rule where an object outside the travelled part is dangerous to the traveller only because it causes his horse to take fright. *Keith v. Easton*, 2 *Allen*, 552 (1861).

¹⁴⁶ *Pomeroy v. Westfield*, 154 *Mass.* 462 (1891). But see *Tidale v. Norton*, 8 *Met.* 388 (1844), and *Shepardson v. Colerain*, 13 *Met.* 55, (1847).

¹⁴⁷ *Aston v. Newton*, 134 *Mass.* 507 (1883); *Lowe v. Clinton*, 136 *Mass.* 24 (1883); *Moran v. Palmer*, 162 *Mass.* 196 (1894).

¹⁴⁸ Mr. Justice Knowlton in *Moran v. Palmer*, 162 *Mass.* 196, 198 (1894).

¹⁴⁹ *Coggswell v. Lexington*, 4 *Cush.* 307 (1849); *Hayden v. Attle-*

§ 77. The Defect in the Highway must be the Proximate Cause of the Accident. — The familiar rule of law that in determining the responsibility of wrongdoers, remote causes are to be disregarded and only such as are proximate are to be taken into account, applies to towns under this statute as well as to any other class of wrongdoers. Hence it has become well settled that they are liable in damages only for the direct and immediate consequences occasioned by defects in their highways.¹⁵⁰ An injury suffered in consequence of efforts, made by the traveller with reasonable care, to extricate himself from a position into which he is brought by reason of a defect in the highway, is a direct result of such defect within the meaning of this rule.¹⁵¹ It necessarily

borough, 7 Gray, 338 (1856); *Harwood v. Oakham*, 152 Mass. 421 (1890). But see *Marshall v. Ipswich*, 110 Mass. 522 (1872).

In *Sullivan v. Boston*, 126 Mass. 540 (1879), it appeared that a portion of a schoolhouse lot was left open and was graded and paved uniformly with the sidewalk of the adjoining street; that there was nothing to indicate the line between the lot and the street; that the space had been open to public use and had been used by scholars and others in going to and from the schoolhouse, and by all persons having occasion to pass over the space; that the plaintiff, a scholar, while passing over this space, caught her foot in a defect and was injured. It was held that the town was not liable for her injury, on the ground that the place of the accident was not within the highway, and there was no evidence to justify a finding that it was within a footpath dedicated to public use by the town. "The fact that this open yard or space was not separated from the sidewalk by a fence is not sufficient to show that it was dedicated to general public use as a part of the system of the highways of the city."

¹⁵⁰ *Harwood v. Lowell*, 4 Cush. 310 (1849); *Marble v. Worcester*, 4 Gray, 395 (1855); *Jenks v. Wilbraham*, 11 Gray, 142 (1858); *Raymond v. Haverhill*, 168 Mass. 382 (1897); *Davis v. Longmeadow*, 169 Mass. 551 (1807).

Where the plaintiff's child fell into a catch-basin the cover of which had been left off, and the plaintiff got down into the basin and rescued the child, and was injured by the exposure to the cold water, the court says: "The only defect in the street was the absence of the cover of the catch basin from its place. But that defect was not the direct and proximate cause of the plaintiff's injury. The cause was her voluntary act, undertaken with full knowledge that the cover of the catch basin was not in its place. On account of the displacement of the cover a condition had resulted, in reference to which the plaintiff determined to make the descent. The absence of the cover was a condition attending the plaintiff's exposure to the cold water, not the cause of it." *Kelley v. Boston*, 180 Mass. 233, 234 (1902).

¹⁵¹ *Lund v. Tyngsboro*, 11 Cush. 563 (1853); *Flagg v. Hudson*, 142

follows from the rule, of course, that if the defect is merely the remote cause of an injury, there can be no recovery under this statute. Thus, if a plaintiff, coming to a defective place in the highway, turns out of the road in order to go around the defective spot and is injured while outside the limits of the highway, he cannot recover damages from the town, although the accident would not have happened but for the defect within the way.¹⁵² Nor will it alter the result if the injury in such a case occurs within the location of the highway, though outside the part wrought for travel.¹⁵³

§ 78. The Defect in the Highway must be the Sole Cause of the Accident. Concurring Causes.—It is the general rule, now well established, that the defect in the highway must be, not only the proximate, but as well the sole, cause of the accident.¹⁵⁴ If, therefore, the wrongful or negligent act of the plaintiff himself,¹⁵⁵ or of a third person,¹⁵⁶ is a concurrent cause of the injury, the plaintiff cannot recover. Cases of this class are, of course, to be distinguished from those where the wrongful or negligent act of a third person creates, or concurs in creating, the defect that occasions the injury, since the law is clear that towns are liable without regard to the origin of the defect.¹⁵⁷

This general rule is, however, given a somewhat liberal interpretation by the court: it is not every intervening act that will serve to break the causal connection.¹⁵⁸ “It is be-

Mass. 280 (1886); *Tuttle v. Holyoke*, 6 Gray, 447 (1856); *Davis v. Longmeadow*, 169 Mass. 551 (1897).

¹⁵² *Tisdale v. Norton*, 8 Met. 388 (1844).

¹⁵³ *Shepardson v. Colerain*, 13 Met. 55 (1847).

¹⁵⁴ *Shepherd v. Chelsea*, 4 Allen, 113 (1862); *Kidder v. Dunstable*, 7 Gray, 104 (1856); *Babson v. Rockport*, 101 Mass. 93 (1869); *Rowell v. Lowell*, 7 Gray, 100 (1856); *Bemis v. Arlington*, 114 Mass. 507 (1874); *Lyons v. Brookline*, 119 Mass. 491 (1876); *Whitford v. Southbridge*, 119 Mass. 564, 573 (1876); *Richards v. Enfield*, 13 Gray, 344 (1859).

¹⁵⁵ *Horrigan v. Clarksburg*, 150 Mass. 218 (1889). And see § 53, *ante*.

¹⁵⁶ *Pratt v. Weymouth*, 147 Mass. 245 (1888).

¹⁵⁷ *Snow v. Adams*, 1 Cush. 443, 446 (1848); *Bacon v. Boston*, 3 Cush. 174 (1849). And see § 75, *ante*.

¹⁵⁸ *Hayes v. Hyde Park*, 153 Mass. 514 (1891); *Block v. Worcester*, 186 Mass. 526 (1904). In this last case Chief Justice Knowlton, after stating the general rule, says at page 528: “But this does not mean that there must be no other innocent or accidental contributing cause. It

cause the act is wrongful, including under this head negligence, not because it is a concurring cause, that the defendant escapes. If the act which concurs with the defect in producing the result complained of is innocent, and is of a kind which the defendant is bound to expect and to provide for,—such, for instance, as another man's driving upon the road,—the jury may find against the town as well as when a particular state of the weather is a concurrent cause.”¹⁵⁹ The innocent intervening act which will not debar the plaintiff from recovering under this statute may be his own act,—as where the plaintiff, without fault on his part,¹⁶⁰ had been led into a position rendered dangerous by reason of a defect in the highway, and, exercising due care and prudence, voluntarily leaped from his carriage in an attempt to save himself and was injured thereby;¹⁶¹ or it may be the act of a means that there must be no other culpable cause. If the wrongful or negligent act of a third person contributes to the injury, there can be no recovery under this statute, even if the plaintiff is in the exercise of due care; but if the defect is a direct and proximate cause of the accident, other concurring conditions which do not involve negligence or culpability, even if they come into a causal relation to the accident, do not relieve the city or town from liability. The party responsible for the defect ought to contemplate the probability of such concurring conditions and contributing causes. The limitation of liability under the statute, as construed by the court, does not go far enough to relieve a city or town because of the existence of such conditions.”

¹⁵⁹ Mr. Justice Holmes in *Hayes v. Hyde Park*, 153 Mass. 514, 516 (1891).

¹⁶⁰ If the plaintiff gets himself into a dangerous situation through his own want of due care, he must extricate himself at his own risk. “A party cannot relieve himself from a dangerous position into which his own fault has brought him and hold the town responsible for the result.” *Little v. Brockton*, 123 Mass. 511 (1878).

Hence, if it be not negligent, the manner in which a person comes into contact with a defect in the highway is immaterial. Thus, where the plaintiff, while passing along the street, saw a loose telephone wire hanging in such a way as to endanger passers by, and stooping to pick it up in order to throw it out of the way, received a severe electrical shock, it was held that the fact that the injury was a result of his intentional act would not defeat his recovery under this statute. *Bourget v. Cambridge*, 156 Mass. 391 (1892).

¹⁶¹ *Lund v. Tyngsboro*, 11 Cush. 563 (1853); *Sears v. Dennis*, 105 Mass. 310 (1870); *Williams v. Leyden*, 119 Mass. 237 (1876); *Thompson v. Bridgewater*, 7 Pick. 188 (1828); *Flagg v. Hudson*, 142 Mass. 280 (1886); *Pomeroy v. Westfield*, 154 Mass. 462 (1891).

third person,—as where the plaintiff was injured by being pushed from the highway, down an unguarded and dangerous declivity, by a crowd, the action of the crowd being neither wilful nor negligent;¹⁶² or it may be a pure accident,—an event that ordinary prudence could not foresee and guard against,—as where the plaintiff was injured by the co-operation of a defect in the highway and a failure of a part of his carriage and harness, which failure was not attributable to any lack of prudence or foresight on his part.¹⁶³

§ 79. A Runaway Horse as a Concurring Cause of the Accident—It has become well settled that the conduct of the horse which the traveller is driving at the time may be the primary cause of the accident, even though it would not have happened but for some culpable defect in the highway. Whether or not it is so turns entirely upon the control that the driver had over the horse at the time of the accident. The rule of law developed from this view is stated in the leading case of *Titus v. Northbridge*¹⁶⁴ in the following language: “When a horse, by reason of fright, disease or viciousness, becomes actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, or upon a place which is defective for want of a railing, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable that merely shies or starts, or is momentarily not controlled by his driver.”¹⁶⁵

¹⁶² *Alger v. Lowell*, 3 Allen, 402, 406 (1862); *Maccarty v. Brookline*, 114 Mass. 527 (1874).

¹⁶³ *Palmer v. Andover*, 2 Cush. 600 (1849). See discussion in *Rowell v. Lowell*, 7 Gray, 100, 102 (1856); *Hayes v. Hyde Park*, 153 Mass. 514 (1891), accord.

¹⁶⁴ 97 Mass. 258, 265 (1867).

It seems that vice of the horse means some trick or habit of the particular horse other than the natural excitability common to horses. See *Brooks v. Acton*, 117 Mass. 204, 209 (1875).

¹⁶⁵ *Fogg v. Nahant*, 98 Mass. 578 (1868); s. c. 106 Mass. 278 (1871); *Davis v. Dudley*, 4 Allen, 557 (1862); *Wright v. Templeton*, 132 Mass.

Therefore, if it appears that the loss of control over the animal was only momentary, and would have been instantly regained had not the vehicle come into contact with the defect, the above rule will not be applied, but the injured person will still be entitled to maintain his action notwithstanding such momentary loss of control.¹⁶⁶

In cases of this kind it is for the jury to say whether, upon all the evidence, there was any loss of control of the horse, and, if there was, whether or not it was merely momentary.¹⁶⁷ And the burden is, of course, upon the plaintiff to satisfy the jury that the horse did not pass beyond his control save for an instant, and that his control would have been immediately regained but for coming in contact with the defect.¹⁶⁸

49, 51 (1882); *Higgins v. Boston*, 148 Mass. 484, 486 (1889); *Coles v. Revere*, 181 Mass. 175 (1902), accord.

"If one drives an unsafe or unsuitable horse, and its characteristics contribute to the accident, the defect in the highway is not the sole cause; it is partly attributable to his own negligence." *Wright v. Templeton*, 132 Mass. 49, 52 (1882).

"The fact that a horse starts or shies at an object in the highway (whether such object is or is not a defect in the way) and is thus brought in contact with a defect, arising either from want of proper repair in the surface of the highway or of sufficient railing at the side of it, is not conclusive against the right of the driver to recover damages against the town for an injury thereby resulting to him; for the most gentle, intelligent and well broken horses will sometimes, in spite of all precautions and efforts of their driver, and yet without in any just sense escaping from his control, swerve out of their direct course to avoid a defect, or what seems to them to be a danger, in the road." Mr. Justice Gray in *Stone v. Hubbardston*, 100 Mass. 49, 54 (1868).

It is not material that the fright of the horse is caused by the negligence of a third person. *Coles v. Revere*, 181 Mass. 175 (1902).

¹⁶⁶ *Britton v. Cummington*, 107 Mass. 347 (1871); *Wright v. Templeton*, 132 Mass. 49 (1882).

¹⁶⁷ *Harris v. Great Barrington*, 169 Mass. 271, 275 (1897); *Coles v. Revere*, 181 Mass. 175 (1902).

In *Wright v. Templeton*, 132 Mass. 49, 51 (1882), the court says: "While extreme cases may be supposed or presented which lie outside the limits of the discretion of a jury, those limits are very broad, and an attempt accurately to define the exact distance beyond which a horse cannot swerve or back without its being also held that he is uncontrollable, could not have been successful. It was a matter properly left to the jury."

¹⁶⁸ *Babson v. Rockport*, 101 Mass. 93 (1869).

Evidence upon the question as to the existence of a defect or a want of repair in or upon the highway:

The Acts of other Persons. — The experiences of other persons in pass-

"OR A WANT OF A SUFFICIENT RAILING"

§ 80. The Duty to erect Railings. — The obligation of towns to erect and maintain suitable railings grows out of the ing the alleged defective spot, had prior to the plaintiff's injury, are generally treated as collateral facts which furnish no legal presumption as to the principal fact in dispute, and are, therefore, not admissible in evidence. Thus it is not competent for the plaintiff to show that another person, before the date of his own injury, received a similar injury at or near the same place, without negligence on his part. *Collins v. Dorchester*, 6 Cush. 396 (1850); *Blair v. Pelham*, 118 Mass. 420, 422 (1875). Nor, on the other hand, can the town show that other persons than the plaintiff had passed and repassed the place alleged to be defective in safety. *Aldrich v. Pelham*, 1 Gray, 510 (1854); *Kidder v. Dunstable*, 11 Gray, 342 (1858); or had driven over it with considerable speed without injury; *Schoonmaker v. Wilbraham*, 110 Mass. 134 (1872); or that no accident had ever happened before at the place of the alleged defect, *Marvin v. New Bedford*, 158 Mass. 464 (1893). And so, where the defect relied on was the insufficient width of the highway, it was held incompetent for the plaintiff to show that other carriages had been unable to pass at the place of the accident, *Merrill v. Bradford*, 110 Mass. 505 (1872), or for the town to show that other vehicles had met and passed at that place without difficulty, *Aldrich v. Pelham*, 1 Gray, 510 (1854). And this rule of evidence is not altered by facts which tend to show that the condition of the highway had all the time remained unchanged. *Merrill v. Bradford*, 110 Mass. 505 (1872); *Aldrich v. Pelham*, 1 Gray, 510 (1854).

The Existence of Similar Defects in other Places. — The fact that like defects existed in other towns can afford a defendant town no excuse for its own neglect of duty. It is not competent, therefore, for a town to prove that the highway where the accident happened was in the usual condition of other country roads, *Kidder v. Dunstable*, 11 Gray, 342 (1858), or that its sidewalks were constructed in the same way as the sidewalks in other towns, *George v. Haverhill*, 110 Mass. 506, 512 (1872); *Marvin v. New Bedford*, 158 Mass. 464 (1893); or that places of the same character had existed for a long time in the streets in other parts of the same town, *Bacon v. Boston*, 3 Cush. 174, 181 (1849); or that the contrivance which constituted the alleged defect was the usual contrivance used in the cities for the purpose for which it was placed in the sidewalk, *Redford v. Woburn*, 176 Mass. 520 (1900); although evidences of this character may be competent as bearing upon the question whether the injured person used due care, on the theory that if similar conditions were common he was bound to exercise care adapted to the existing state of things, *Packard v. New Bedford*, 9 Allen, 200 (1864). So evidence that in other towns the portions of the highway between the carriage-way and the sidewalk were not deemed to be portions of the highway which were to be wrought for travel and kept in repair for the use of foot passengers, is not admissible. *Raymond v. Lowell*, 6 Cush. 524 (1850).

The State of the Highway at other Times. — Evidence of the condition of the highway at a time prior to, or subsequent to, the accident in ques-

statutory duty that rests upon them to keep their highways in such condition that they may be reasonably safe and con-

tion is admissible, provided that it is so near in point of time, or is accompanied by such further facts, as to furnish a presumption that its condition has not changed meanwhile. *Berrenberg v. Boston*, 137 Mass. 231 (1884); *Woodcock v. Worcester*, 138 Mass. 268 (1885); *Neal v. Boston*, 160 Mass. 518, 522 (1894), point 3. Thus, where the accident happened on Monday morning, evidence of the condition of the highway at the point in question on the previous Saturday night was admitted. *Sheren v. Lowell*, 104 Mass. 24 (1870). And see *Daniels v. Lowell*, 139 Mass. 56 (1885). And so evidence of the condition of the highway ten or twelve days after the accident, coupled with evidence that it had remained practically unchanged during that time, was admitted. *Miller v. North Adams*, 182 Mass. 569, 571 (1903). Likewise evidence as to the state of the highway at the place of the accident nine months after the injury has been admitted when accompanied with testimony tending to show that its state had remained unchanged during that time. *Brooks v. Petersham*, 16 Gray, 181 (1860). See also *George v. Haverhill*, 110 Mass. 508 (1872). Such evidence, of course, is not admitted when it appears that important changes in the highway have intervened. *Hebert v. Northampton*, 152 Mass. 266 (1890). How far either side of the day of the accident the limit shall be extended is for the court, in the exercise of a reasonable discretion, to determine. *Neal v. Boston*, 160 Mass. 518, 522 (1894). "A usual and habitual state of things, dependent upon natural causes, and constantly producing the same results, has a legitimate tendency to show that the result was in existence at a particular time. Such evidence, however, would not be competent for the direct purpose of showing the shape or dimensions of the ridges of ice on the day when the accident occurred, unless it was so near in point of time, or accompanied with such other evidence of temperature and climate in the meantime, as to furnish a presumption that its condition remained unchanged." *Berrenberg v. Boston*, 137 Mass. 231 (1884), and see *Neal v. Boston*, 160 Mass. 518 (1894). Where the injury was occasioned by an obstruction in the highway, evidence that it was in the road on the day before the accident, but had been removed at night, was held not to be admissible. *Donaldson v. Boston*, 16 Gray, 508 (1860).

Admissions. — It has been held that it is not competent for the plaintiff to put in evidence, as an admission on the part of the town that the highway in question was defective, the report of certain committees of the town in relation to the condition of the highway, and the votes of the inhabitants thereon. *Collins v. Dorchester*, 6 Cush. 396 (1850); *Wheeler v. Framingham*, 12 Cush. 287 (1853).

The report of a committee appointed by the town to inquire into the facts as to the plaintiff's injury, and the votes of the town accepting such report, are not admissible as admissions of liability where the reports do not set out facts showing the liability, and where the votes do not acknowledge any liability or provide for any settlement. *Dudley v. Weston*, 1 Met. 477 (1840).

Evidence tending to show that two weeks after the accident happened

venient for travel in the ordinary modes. Such protection must be provided where, and only where, it is necessary in order to render the way itself safe for ordinary travel.¹⁶⁹ A town is not bound, therefore, to put up a railing in order to prevent travellers from straying out of the highway, although there is a dangerous place at some distance from the travelled path which may be reached by straying.¹⁷⁰ Nor again, in order to prevent frightened animals from escaping from the highway; and the fact that the near location of a railroad may make such an occurrence probable will not alter this result.¹⁷¹ And a town is under no obligation to anticipate and guard against by railings ordinary dangers that are likely to arise, as the formation of ice upon the adjacent land, which with the ice upon it was dangerous to persons who might stray on to it.¹⁷² As was said in *Damon v. Boston*:¹⁷²

“The danger which requires a railing must be of an unusual character, such as bridges, declivities, excavations, steep banks, or deep water. Spaces adjoining roads, streets, and the road commissioner of the town repaired the place alleged to be defective, there being nothing to show that the town had voted to make the repairs, or had ratified the act of the commissioner, is not admissible. *Spooner v. Freetown*, 139 Mass. 235 (1885).

The statements of a surveyor of highways, or of a selectman, as to the condition of the highway, are not admissions binding upon the town. *Weeks v. Needham*, 156 Mass. 289, 291 (1892).

Expert Testimony.—The testimony of an expert upon this question is not admissible, since it relates to a matter on which the common experience and observation of the jury qualify them to pass when the actual condition of the way has been described to them. *Edwards v. Worcester*, 172 Mass. 104 (1898).

It was held in *Hutchinson v. Methuen*, 1 Allen, 33 (1861), that the opinion of a witness as to the state of repair of a highway two or three months before the accident was not competent.

¹⁶⁹ *Stone v. Attleborough*, 140 Mass. 328 (1885); *Commonwealth v. Wilmington*, 105 Mass. 599, 601 (1870); *Stockwell v. Fitchburg*, 110 Mass. 305 (1872); *Richardson v. Boston*, 156 Mass. 145 (1892).

¹⁷⁰ *Puffer v. Orange*, 122 Mass. 389 (1877); *Sparhawk v. Salem*, 1 Allen, 30 (1861).

¹⁷¹ *Adams v. Natick*, 13 Allen, 429 (1866).

¹⁷² *Damon v. Boston*, 149 Mass. 147 (1889).

Under a declaration simply alleging a want of repair in a way, the plaintiff may prove that the way was defective by reason of the want of a railing to protect travellers from going down a declivity just outside the limits of the way. *Alger v. Lowell*, 3 Allen, 402, 405 (1862).

sidewalks, and unsuitable for travel, are often left open in both country and city; and a town or city is not bound to fence against them, unless their condition is such as to expose travellers to unusual hazard."

§ 81. **The Test of the Necessity of a Railing.**— While it may be very difficult, if not impossible, to define by any general proposition the exact extent of the obligation of towns to erect railings along their highways, there is a practical test that may materially aid in the determination of any particular case. That practical test is whether there is a dangerous object or place so near to the line of travel as to make the use of the highway itself unsafe in the absence of a railing. If there is such an object or place, so located, a town is bound to provide and to maintain sufficient guards to protect travellers from the dangers incident to it.¹⁷³

It becomes thus usually a question of fact for the jury to determine how near to the highway a dangerous place must be, and consequently how great must be the risk of coming upon it, in order to render the want of a railing a defect within the meaning of this statute.¹⁷⁴ If, however, in view of the evidence most favorable to the plaintiff, the danger is

¹⁷³ *Alger v. Lowell*, 3 Allen, 402 (1862); *Coggswell v. Lexington*, 4 Cush. 307 (1849); *Hayden v. Attleborough*, 7 Gray, 338 (1856); *Sparhawk v. Salem*, 1 Allen, 30 (1861); *Adams v. Natick*, 13 Allen, 429 (1866); *Murphy v. Gloucester*, 105 Mass. 470, 472 (1870); *Marshall v. Ipswich*, 110 Mass. 552 (1872); *Purple v. Greenfield*, 138 Mass. 1 (1884); *Logan v. New Bedford*, 157 Mass. 534 (1893); *Tisdale v. Bridgewater*, 167 Mass. 248 (1897).

Where steps were built out into the highway under a statute permitting them to be so constructed, it was held that the town was under no obligation to erect any railing or guard to protect travellers from them. *Cushing v. Boston*, 124 Mass. 434 (1878).

In *Compton v. Revere*, 179 Mass. 413 (1901), it appeared that the grade of the highway was being changed and that the surface had been left for months in a rough condition, the dirt lying in heaps as it had been dumped from the carts; that the evidence was conflicting as to whether there had been any barriers. It was held that "the object of a barrier is to notify the public that it is unsafe to proceed; but where the condition of the street is such as is shown by the evidence in this case, the condition itself is as strong a notice as any that could be given," and hence that it was not material whether there had been any barrier.

¹⁷⁴ *Barnes v. Chicopee*, 138 Mass. 67 (1884).

so slight that it would be unreasonable to require the town to provide a railing, the court will decide the question as matter of law.¹⁷⁵ Under this rule it has been held as matter of law that a dangerous place was too remote from the travelled path to make the absence of a railing a defect in the highway where it was thirty-four feet distant;¹⁷⁶ where it was twenty-five feet distant;¹⁷⁷ where it was twenty to thirty feet distant;¹⁷⁸ where it was seventeen feet distant.¹⁷⁹ But where the dangerous place was twelve feet distant from the travelled path, it was held that it could not be said as matter of law that the risk was so small as to make it unreasonable to require the town to provide a railing.¹⁸⁰

In order to determine whether a dangerous place is in such close proximity to the highway as to render travelling upon it unsafe, "that proximity must be considered with reference to the highway as travelled and used for public travel, rather than as located."¹⁸¹

But while the proximity of some dangerous object or place is the "essential and invariable element" in all cases where a railing is required, the circumstances surrounding the particular locality in question must also be taken into consideration. Thus the character of the intervening ground, the risk of coming upon the dangerous object or place, the degree of danger incurred if one does come upon it, and like practical questions, are all involved in the issue.¹⁸²

§ 82. The Kind of Railing required.—Towns must anticipate and provide for the usual demands of travel upon their highways: if they have done this, they have fulfilled their whole duty under the statute. In the matter of railings,

¹⁷⁵ *Scannal v. Cambridge*, 163 Mass. 91, 93 (1895).

¹⁷⁶ *Barnes v. Chicopee*, 138 Mass. 67 (1884).

¹⁷⁷ *Murphy v. Gloucester*, 105 Mass. 470 (1870); *Hudson v. Marlborough*, 154 Mass. 218 (1891).

¹⁷⁸ *Puffer v. Orange*, 122 Mass. 389 (1877); *Daily v. Worcester*, 131 Mass. 452 (1881).

¹⁷⁹ *Scannal v. Cambridge*, 163 Mass. 91, 93 (1895).

¹⁸⁰ *Tisdale v. Bridgewater*, 167 Mass. 248 (1897).

¹⁸¹ *Barnes v. Chicopee*, 138 Mass. 67 (1884); *Warner v. Holyoke*, 112 Mass. 362 (1873).

¹⁸² See *Adams v. Natick*, 13 Allen, 429 (1866).

therefore, they are bound simply to provide such a kind as is "suitable for the ordinary exigencies of travel upon such a road at such a place."¹⁸³ It follows from this rule that if a railing is used for any purpose other than the requirements of ordinary travel, and a person is injured in consequence of so using it, he cannot recover damages from the town under this statute, even though it also appears that the railing was so defective that it would not have withstood the usual strains of travel. Thus a railing which was not of sufficient strength to sustain the weight of a person who purposely leaned against it for support while engaged in conversation, is not insufficient within the meaning of this statute.¹⁸⁴

The question of the sufficiency of the railing provided by the town is commonly one of fact for the jury to decide upon all the evidence.¹⁸⁵

§ 83. The Duty to erect Barriers to guard an Excavation in the Highway, or other Danger to Travel. — Persons having occasion to travel upon the public ways have a right to act upon the assumption that such ways have not been rendered dangerous by reason of the existence of unguarded excavations or other dangers to travel of a like nature. Hence, if a town makes, or allows to be made, excavations, piles of material, or other similar conditions dangerous to travel, within the limits of a highway, it is bound to use reasonable care and diligence to protect the travelling public by the erection of such barriers or other safeguards as will render travel upon the remainder of the highway reasonably safe.¹⁸⁶

If a town has performed its full duty in this regard by building proper barriers, it will not be liable to a person injured in consequence of such excavation, pile of material, or other danger to travel, even if the barriers were after-

¹⁸³ Lyman *v.* Amherst, 107 Mass. 339, 346 (1871).

¹⁸⁴ Stickney *v.* Salem, 3 Allen, 374 (1862).

¹⁸⁵ Lyman *v.* Amherst, 107 Mass. 339, 346 (1871).

¹⁸⁶ Myers *v.* Springfield, 112 Mass. 489 (1873); Sampson *v.* Boston, 184 Mass. 46 (1903); Hyde *v.* Boston, 186 Mass. 115 (1905). And see § 70, *ante*.

wards removed by third persons or by some accident, unless it further appears that the town knew, or, under the circumstances of the particular case, ought to have known, of such removal.¹⁸⁷

§ 84. The Duty to erect Barriers to close a Highway. — In the absence of notice to the contrary, a traveller upon the highway may properly assume that a way which appears to be open and to be used for public travel has not been technically closed by a vote of the proper authorities.¹⁸⁸ And a town will remain liable under this statute for injuries suffered by him while travelling upon such way, unless and until it has given notice, by the erection of suitable barriers or otherwise, that such way has been closed to the public.¹⁸⁹

§ 85. The Duty to erect Barriers to protect Persons entering upon the Highway from Private Ways. — The law does not require persons to enter upon a highway in any particular manner or at any fixed place. It is not material, therefore,

¹⁸⁷ *Doherty v. Waltham*, 4 Gray, 596 (1855); *Myers v. Springfield*, 112 Mass. 489 (1873).

Where a part of the width of a sidewalk was railed off, and the plaintiff, in order to get around the barriers, attempted to pass upon that part of the street which was wrought and used for carriages, and was there injured by reason of a defect, it was held that it was a question to be submitted to the jury whether he was justified in so doing. *Gerald v. Boston*, 108 Mass. 580 (1871).

But a town has no right to erect permanent barriers within a highway in order to change the line of travel, and therefore a railing erected for that purpose by the selectmen may constitute a defect for which the town will be liable. *Pratt v. Amherst*, 140 Mass. 167 (1885).

Where a part of the sidewalk was railed off by a barrier extending from a building to a tree and by another barrier about thirty feet from the first one, extending from a building to a telegraph pole, leaving a space of five feet between the tree and the curb and a space of two feet between the telegraph pole and the curb, it was held that the barriers obstructed only so much of the sidewalk as was within a line drawn from the tree to the telegraph pole and that the town might be liable to a person injured while using the part outside such line. *Leonard v. Boston*, 183 Mass. 68 (1903).

¹⁸⁸ Where there was a "permit to close the street" but no vote so to do by the proper authorities, it was held that the street was not technically closed to public travel by the proper authorities. *Jones v. Collins*, 188 Mass. 53 (1905).

¹⁸⁹ *White v. Boston*, 122 Mass. 491 (1877); *Jones v. Collins*, 177 Mass. 444 (1901). And see *Jones v. Collins*, 188 Mass. 53 (1905).

so far as the duty of towns to keep their public ways reasonably safe and convenient for travel in the ordinary modes is concerned, whether they enter and are lawfully upon the highway by passing over private or public ways. It has been held accordingly that if there is known to be a large amount of public travel coming from private ways or lots and entering a public way, and if a traveller entering such public way laterally from the private way or lots would, while using due care, be exposed to the danger of an injury in consequence of the existence of an excavation or other defect within such public way, the town is as much bound to erect barriers or to provide other safeguards to protect such travellers so entering the way, as to guard those who come toward the defective spot in the direct line of travel.¹⁹⁰

§ 86. The Kind of Barriers required to guard an Excavation or Like Danger to Travel. — When erecting barriers to guard an excavation, pile of material, or like defect within the limits of the highway, the object is to make them of such height, strength and material as to protect travellers against all of those exigencies of travel which, in the use of a way so defective, may reasonably be foreseen and for which provision may be made.¹⁹¹ Whether the barriers erected by the

It was held in *Compton v. Revere*, 179 Mass. 413, 414 (1901), that where the condition of the street was such as to notify the traveller that it was closed to public travel, the question whether there had ever been a barrier to prevent its use was not material.

¹⁹⁰ *Burnham v. Boston*, 10 Allen, 290 (1865). In this case the court says: "It cannot be said that it is *per se* negligence for a person to enter from adjoining houses or lands on a defective or dangerous part of a way, who has no knowledge of the defect or want of repair, nor any notice that it had been closed against public travel by barriers erected in another place to prevent the use of the way by those coming upon it either in the line of direct travel or from intersecting streets. Nor can it be maintained that a city or town would in all cases fulfil the duty incumbent on it by law by merely placing barriers across a street or way to protect travellers from injury by an existing defect or want of repair, without adopting any measures to guard against accident to those who might have occasion lawfully to come on the dangerous portion of the way from private lands adjoining and lying within the limits which were closed against travellers approaching in other directions."

¹⁹¹ *Norwood v. Somerville*, 159 Mass. 105 (1893).

town are suitable and sufficient to accomplish that object under the circumstances of the particular case is commonly a question for the jury to decide.¹⁹²

§ 87. The Kind of Barriers required to close a Highway.—The purpose of erecting barriers to close a highway is not primarily to protect the travelling public from dangers that may exist on such way, but to notify it that the way is closed to travel. Any barriers of such height, strength, and materials as will serve to give such notice are sufficient, although they might not be suitable directly to protect travellers from dangers existing on the way itself.¹⁹³ “Where the way has been closed by vote after it once has been opened, the question is a question of notice express or implied. If the town has attempted to give notice by the erection of barriers, the question is whether the barriers alone or the barriers coupled with a notice on them are sufficient notice.”¹⁹⁴

In the determination of the question of the sufficiency of such barriers, which is usually for the jury, several considerations may be involved, such as the situation of the highway; the modes commonly adopted for closing highways; the traveller’s knowledge of such modes; and like facts.¹⁹⁵

¹⁹² Howard *v.* Mendon, 117 Mass. 585 (1875); Norwood *v.* Somerville, 159 Mass. 105 (1893).

¹⁹³ White *v.* Boston, 122 Mass. 491 (1877). And see Jones *v.* Collins, 188 Mass. 53 (1905).

Speaking of the difference in the requirement as to sufficiency where barriers are erected to guard an excavation or like danger and where they are erected to close a highway, Mr. Justice Loring says, in Jones *v.* Collins, 188 Mass. 53, 55 (1905): “If barriers are relied upon in a case of one class and the question of their sufficiency is raised, a decision on the sufficiency of barriers in a case belonging to the other class is beside the point. The purpose of the barriers and the office served by them are quite different in the two classes of cases.”

¹⁹⁴ Mr. Justice Loring in Jones *v.* Collins, 188 Mass. 53, 55 (1905).

¹⁹⁵ White *v.* Boston, 122 Mass. 491 (1877).

In this case the only barrier was a wooden horse with a lantern upon it, placed in the carriage path. The court says, at page 495: “Such a barrier as existed in this case might have one interpretation in the country and a different one in the town; it might indicate a closing for some kinds of travel and not for all. It might require a party not to enter at all upon the way, or it might require only that, if he entered,

"IN OR UPON A WAY, CAUSEWAY OR BRIDGE,"

§ 88. **The Place where the Accident happened must be a Public Way.**— The statutory duty of towns from which springs this liability relative to ways applies only to such as are public highways;¹⁹⁶ that is, to such as have been duly established and opened for the public use.¹⁹⁷ It is an essential element, therefore, in every action under this statute to recover damages for injuries sustained upon a travelled way, to show that such way was a public way. The injured person must, in other words, prove the legal establishment of the way. The burden of proof thus imposed may be sustained by evidence along any one of several lines; namely, by evidence tending to show the due location, construction, and acceptance of the way by the proper authorities, in he should do so with more caution than otherwise; and what degree of additional care it demanded was a question for the jury. The court cannot say, as matter of law, that different modes are not adopted in different places; and that some barriers indicate only that a particular kind of travel is deemed dangerous, and not all kinds of travel; nor that a portion of the way is not fit to be used, while other parts of the same way are to be deemed open to travel as safe and convenient."

¹⁹⁶ It may be noted that in this section of the statute in the Revised Laws, 1902, the general term "way" is substituted for the words "highway, town way" theretofore used.

For the distinction between a highway and a town way, see *Blackstone v. County Commissioners*, 108 Mass. 68 (1871).

The provision relating to state highways is as follows: Rev. Laws, ch. 47, § 13. The commonwealth shall be liable for injuries sustained by persons while travelling on state highways, in the manner and subject to the limitations, conditions and restrictions provided in sections eighteen, twenty and twenty-one of chapter fifty-one, except that notice of the injury shall be given to a member of the commission or to its secretary. The commonwealth shall not be liable for an injury which may be sustained upon the sidewalk of a state highway or during the construction of such highway. The amount which may be recovered for any such injury shall not exceed one-fifth of one per cent of the state valuation last preceding the commencement of the action of the city or town in which the injury was received, nor shall it exceed four thousand dollars.

¹⁹⁷ "This liability is limited. It is confined to two classes of ways; first, those which the municipality is legally bound to keep in repair, and, second, those as to which they are in law estopped to deny such liability." Mr. Justice Lord in *Rouse v. Somerville*, 130 Mass. 361, 362 (1881).

accordance with the provisions of the statutes;¹⁹⁸ by evidence tending to show a general and uninterrupted use of the way by the public, continued for the length of time necessary to establish a prescription;¹⁹⁹ by evidence tending to show a dedication of the way to the public by the owner of the soil, and an acceptance of it by the town prior to 1846;²⁰⁰ by evidence tending to show that the town had made repairs upon the way within six years prior to the accident.²⁰¹ So far as the duty of towns is concerned, it appears to make no difference in what one of these ways the road became a public way.

§ 89. Public Ways established in Due Form of Law.—Speaking broadly two things done by the proper authorities must occur to establish under the general law a highway for the defects in which a town is liable: first, an adjudication that the way was of common convenience and necessity, and a location of it; and, second, a construction and opening of it to the public for use.²⁰² Any illegality in either proceeding

¹⁹⁸ Rev. Laws, ch. 48; *Bliss v. Deerfield*, 13 Pick. 102 (1832); *Drury v. Worcester*, 21 Pick. 44 (1838).

¹⁹⁹ *Veale v. Boston*, 135 Mass. 187 (1883); *Aston v. Newton*, 134 Mass. 507 (1883); *Gould v. Boston*, 120 Mass. 300 (1876); *Taylor v. Boston Water Power Company*, 12 Gray, 415 (1859); *Jennings v. Tisbury*, 5 Gray, 73 (1855).

²⁰⁰ *Hobbs v. Lowell*, 19 Pick. 405 (1837); *Hayden v. Stone*, 112 Mass. 346 (1873); *McKenna v. Boston*, 131 Mass. 143 (1881); Rev. Laws, ch. 48, § 98.

²⁰¹ Rev. Laws, ch. 51, § 24; *Hayden v. Attleborough*, 7 Gray, 338 (1856); *Wilson v. Boston*, 117 Mass. 509 (1875).

The actual making of repairs must be shown, however, in order to have this effect; a vote of the town to make repairs upon the particular way, so long as unexecuted, is not enough. *Brown v. Lawrence*, 120 Mass. 1 (1876). And the making of the repairs is conclusive only upon the question of the location of the way, and not necessarily upon the question of the responsibility of the town for its defects. *Wilson v. Boston*, 117 Mass. 509 (1875).

In *Whitman v. Groveland*, 131 Mass. 553, 557 (1881), the liability was based upon an award of commissioners by virtue of which the duty to repair the particular way where the accident happened was imposed upon the defendant town.

A flight of stairs in a building owned by the defendant town, leading only to a room in it used as a polling place, is not a highway or town way within the meaning of this statute. *McNeil v. Boston*, 178 Mass. 326 (1901).

²⁰² Rev. Laws, ch. 48; *Bliss v. Deerfield*, 13 Pick. 102 (1832); *Drury*

can be taken advantage of by the town in defence, even though the way has been used and repaired as a highway.²⁰³

§ 90. Public Ways established by Prescription.—A constant and uninterrupted use and enjoyment of a way by the public, continued for the requisite number of years,²⁰⁴ will establish a highway by prescription,²⁰⁵ on the theory that a user of such a character, so long continued, raises a conclusive presumption that the way was originally laid out and accepted by competent authority.²⁰⁶ Nothing, therefore, except such user need be shown.²⁰⁷

§ 91. Public Ways established by Dedication.—Two distinct elements are essential to the establishment of a highway by dedication: first, an appropriation of the soil by the owner

²⁰³ Worcester, 21 Pick. 44 (1838). And see *Bowman v. Boston*, 5 Cush. 1 (1849); *Baker v. Fall River*, 187 Mass. 53, 55 (1904).

²⁰⁴ *Jones v. Andover*, 9 Pick. 146 (1829).

Towns are only bound to keep in repair their highways as located and laid out by the proper authorities; this duty does not extend beyond the limits so defined. If, therefore, there are defects in the way due to the location, as narrowness or crookedness, the town is not responsible for them. *Smith v. Wakefield*, 105 Mass. 473 (1870).

²⁰⁵ The time of prescription is now to be considered as fixed at twenty years. *Jennings v. Tisbury*, 5 Gray, 73 (1855). As to the effect of a relocation of the way upon the running of the twenty years, see *Stockwell v. Fitchburg*, 110 Mass. 305 (1872).

²⁰⁶ "Perhaps it would not be too much to say, that a large portion of the public ways, whether they be considered public highways, or town ways, stand upon no other title but prescription." Chief Justice Shaw in *Jennings v. Tisbury*, 5 Gray, 73 (1855).

In the city of Boston public footways may exist by prescription, which the city is bound to keep in repair. *Gould v. Boston*, 120 Mass. 300 (1876). And elsewhere as well. *Bassett v. Harwich*, 180 Mass. 585 (1902).

²⁰⁷ *Veale v. Boston*, 135 Mass. 187 (1883); *Aston v. Newton*, 134 Mass. 507 (1883); *Bassett v. Harwich*, 180 Mass. 585 (1902); *Commonwealth v. Coupe*, 128 Mass. 63 (1880); *Taylor v. Boston Water Power Company*, 12 Gray, 415 (1859).

²⁰⁸ *Jennings v. Tisbury*, 5 Gray, 73 (1855).

Bare use by the public, unexplained, is enough to prove a highway by prescription, even though there has been no act of recognition, such as the making of repairs, on the part of the town. *Bassett v. Harwich*, 180 Mass. 585 (1902).

In *McKay v. Reading*, 184 Mass. 140 (1903), it was held that a way by prescription could not be acquired over a portion of an open common, by the passing and repassing of the public during a period of twenty

to the use of the public for a highway;²⁰⁸ and, second, an acceptance of it, either express or implied, by the town.²⁰⁹ These two acts, as soon as done by the respective parties, complete the dedication and establish the way as a highway: no lapse of time is necessary.²¹⁰

The intent of the owner of the soil of a road to appropriate it to the use of the public for a highway must be shown by unequivocal acts or declarations.²¹¹ And so also the acquiescence in that appropriation by the town or by its officers, acting within the scope of their authority, must clearly appear.²¹² Mere user by the public, though strong evidence, is not alone sufficient to establish either fact.²¹³ And since the statute of 1846, ch. 203,²¹⁴ the acceptance of the town can only be given by laying out the way in accordance with the mode prescribed by the statutes.²¹⁵

§ 92. The Opening of the Way to Public Use. When the Liability begins. — It seems that no precise rule can be laid down fixing the exact stage in the proceedings to establish a public way at which it will be considered so far open to the public years, so as to make the town liable for defects therein. See also Rev. Laws, ch. 53, § 17.

The statute of 1846, ch. 203 (Rev. Laws, ch. 48, § 98), has no application to ways by prescription: they can be established by this mode as well since as before the passage of that act. *Com. v. Coupe*, 128 Mass. 63 (1880).

²⁰⁸ “He who gives his land to the public may prescribe the terms and limitations on which he gives it, and if it be accepted at all, it must be accepted with the limitations, qualifications and restrictions prescribed. . . . If it be given for a special and limited use and purpose, as for a footway, it must be accepted and held for that use only; or it must fail altogether, and then no public right is established by the gift.” Chief Justice Shaw in *Hemphill v. Boston*, 8 Cush. 195 (1851). If, therefore, a highway is established by dedication for use as a footway, the town is not liable to a person injured while using it for other purposes. s. c.

²⁰⁹ *Hobbe v. Lowell*, 19 Pick. 405 (1837); *Bowers v. Suffolk Manufacturing Company*, 4 Cush. 332, 340 (1849).

In *Tyler v. Sturdy*, 108 Mass. 196 (1871), it was held that public footways may be established by dedication in this commonwealth.

²¹⁰ See *Taylor v. Woburn*, 130 Mass. 494, 500 (1881).

²¹¹ See *Hayden v. Stone*, 112 Mass. 346 (1873).

²¹² *McKenna v. Boston*, 131 Mass. 143 (1881); *Bowers v. Suffolk Manufacturing Company*, 4 Cush. 332, 340 (1849).

²¹³ Rev. Laws, ch. 48, § 98.

²¹⁴ *Guild v. Shedd*, 150 Mass. 255 (1889); *Morse v. Stocker*, 1 Allen, 150, 154 (1861).

that liability under this statute for its defective condition will attach. It is certain, however, that after a way has been duly located and constructed, no formal act of acceptance is necessary in order to impose upon the town the duty of keeping it in a reasonably safe condition: if it permits the public to treat and use as a public way land that has been laid out and partially or completely improved for a highway, though not formally accepted as such, it will be liable for injuries due to its unsafe condition.²¹⁵ "After a highway has been regularly laid out, by competent authority, a time fixed for the town to complete it, and it is subsequently actually opened to the use of the public, those who have the right to use it, may presume that what was to be done by way of acceptance, has been done, and that it has become in fact a public highway. . . . Whenever by positive act or tacit permission, they suffer a highway to be opened to public use, and to be actually used by the public, the town becomes responsible for its condition."²¹⁶

§ 93. The Liability as to Ways dedicated to, but not accepted by, the Public. — A way that has been appropriated by the owner of the soil to the public use since the passage of the statute of 1846, ch. 203,²¹⁷ but has not been laid out by the town in accordance with the provisions of that act, imposes no liability upon the town under this statute, provided the town has either closed the entrance to such way, or given sufficient notice that it was dangerous.²¹⁸ A notice stating that such way is a private way and is dangerous, so posted as to be conspicuous and legible to persons entering thereon, is a sufficient notice to satisfy this rule.²¹⁹

²¹⁵ *Drury v. Worcester*, 21 Pick. 44 (1838). See *Lynch v. Boston*, 186 Mass. 148 (1904), where the plaintiff was injured while passing over a strip taken for widening the street, which strip was still rough and not completely fitted for travel, and it was held that she could not recover for her injury.

²¹⁶ Chief Justice Shaw in *Drury v. Worcester*, 21 Pick. 44, 49 (1838).

²¹⁷ Rev. Laws, ch. 48, §§ 98-100.

²¹⁸ *Smith v. Lowell*, 139 Mass. 336 (1885); *Paine v. Brockton*, 138 Mass. 564 (1885); *Durgin v. Lowell*, 3 Allen, 398 (1862).

²¹⁹ *Smith v. Lowell*, 139 Mass. 336 (1885).

As to the liability for an injury resulting from a defect in a private

STATUTORY LIABILITIES OF COUNTIES, CITIES AND TOWNS. 97

§ 94. The Width of the Public Way.—Towns are not necessarily bound to prepare and maintain in a reasonably safe condition for travel the full located width of the highway. And this is peculiarly true as to towns in sparsely settled districts, where travel is comparatively light. They fulfil their entire duty in this regard, therefore, when they have wrought and kept in a condition fit for ordinary use a highway of sufficient width reasonably to accommodate public travel at the particular place and time.²²⁰ If they have done this much, they will not ordinarily be responsible for injuries sustained by a person who was, at the time of the accident, travelling upon some other part of such highway.²²¹

§ 95. The Effect of Evidence of Repairs made upon Public Ways.—By virtue of statute provision,²²² repairs made by a town upon a way within six years before an accident are conclusive as to its location.²²³ The actual making of repairs

sidewalk, which was laid out and paved continuous with the sidewalk of the street and apparently formed a part of it, see *Holmes v. Drew*, 151 Mass. 578 (1890). As to the individual liability for a defective coal-hole set in the sidewalk, see *Fisher v. Cushing*, 134 Mass. 374 (1883). *Stevenson v. Joy*, 152 Mass. 45 (1890). As to liability for defects in a footpath, — 1st, across a common, see *Clark v. Waltham*, 128 Mass. 567 (1880); *Steele v. Boston*, 128 Mass. 583 (1880): 2d, by the side of a country road, see *Whitford v. Southbridge*, 119 Mass. 564 (1876). As to the liability for defects in streets on certain lands under the care and control of the Metropolitan Park Commission, see St. 1898, ch. 455. As to the liability for defects in public alleys in the city of Boston, see St. 1898, ch. 298, § 2.

²²⁰ *Paine v. Brockton*, 138 Mass. 564, 568 (1885).

²²¹ See § 76, *ante*.

It has been held that a town is not liable for injuries occasioned by the narrowness and crookedness of the highway, said defects being due to the manner in which it was laid out by the county commissioners, on the ground that the town had no right to go outside of the limits defined by the location in order to make the highway more safe for travel. *Smith v. Wakefield*, 105 Mass. 473 (1870). But it seems that the town will be liable where the narrowness and crookedness are not due to its location but to the manner in which it is prepared for travel. *Hawks v. Hawley*, 123 Mass. 210 (1877).

²²² Rev. Laws, ch. 51, § 24. "The statute was adopted originally to remedy the difficulty of proving the legal establishment of ways, arising from absence or defects of records thereof." *Wilson v. Boston*, 117 Mass. 509, 512 (1875).

²²³ *Hayden v. Attleborough*, 7 Gray, 338 (1856); *Taylor v. Woburn*, 130 Mass. 494, 500, 502 (1881).

must be shown, however, in order to have this effect: a vote of the town to make repairs, so long as unexecuted, is not enough.²²⁴

The making of repairs is conclusive only upon the question of the location of the way, and not necessarily upon the question of the responsibility of the town for its defects. Thus, if the liability for defects in a way is imposed by statute upon another, the town cannot be made responsible by showing repairs made by it within six years before the accident.²²⁵

§ 96. The Discontinuing of the Way. When the Liability ceases. — In order completely to end its responsibility for the safe condition of any particular highway or portion of a highway, whether temporarily or permanently, a town must take such steps as may be necessary to bring about an actual discontinuance of it as to all persons both by day and during the night time. In the absence of anything to the contrary, travellers have the right to assume that a way which appears to be open and to be used by the public has not been discontinued. Hence, as a general rule some effectual notice that the way is no longer open to public travel must be given by the town. By the erection of barriers or by some other equally effective means, it must so withdraw the highway or portion of highway from use as to leave no doubt of its intention wholly to exclude the public therefrom. Until it has employed such precautions and guards as may be sufficient effectually to warn travellers in the exercise of due care that such highway has been closed to public travel, its liability as to all persons without notice²²⁶ remains unchanged.²²⁷

²²⁴ *Brown v. Lawrence*, 120 Mass. 1 (1876).

²²⁵ *Wilson v. Boston*, 117 Mass. 509 (1875).

Evidence of the making of repairs within six years is not material where the highway has been discontinued by an act of the legislature. *Nicodemo v. Southborough*, 173 Mass. 455 (1899).

²²⁶ When a person knows that a way is closed to public travel he uses it at his peril. *Compton v. Revere*, 179 Mass. 413 (1901).

²²⁷ *White v. Boston*, 122 Mass. 491 (1877). And see *Nicodemo v. Southborough*, 173 Mass. 455 (1899), and *Tinker v. Russell*, 14 Pick. 279 (1833), where the way in question was discontinued by act of the legislature.

The question whether or not the means employed by it were sufficient to bring about an actual discontinuance of the way is usually a question of fact for the jury to decide in each particular case.²²⁸

"AND SUCH INJURY OR DAMAGE MIGHT HAVE BEEN PREVENTED, OR SUCH DEFECT OR WANT OF REPAIR OR WANT OF RAILING MIGHT HAVE BEEN REMEDIED BY REASONABLE CARE AND DILIGENCE"

§ 97. **The General Effect of this Provision.**—Prior to 1877 the fact that a person was injured by reason of a defect or a want of repair in a highway, which defect or want of repair had existed for twenty-four hours, was enough to fasten this statutory liability upon the town, without regard to the question whether or not its continuance could have been prevented by the exercise of reasonable care and diligence.²²⁹ In that year, however, the legislature incorporated²³⁰ the present provision²³¹ in the highway act, with the evident intention of relieving towns from this liability in all cases where there was no lack of proper care and diligence on their part in seeking to remedy the defective condition that caused the injury.²³² And since the enactment of this provision, negligence has been the sole basis of their liability under this statute. Consequently it is not now enough for a person to show the mere existence for a certain length of time of a defect or a want of repair in the highway by reason of which he sustained an injury; he must also show that the continued existence of that defect or want of repair was due

²²⁸ Howard v. Mendon, 117 Mass. 585 (1875); White v. Boston, 122 Mass. 491 (1877).

²²⁹ Therefore before this date the fact that the town had used reasonable care in repairing a way constituted no defence, provided the way was not in fact made safe and convenient. Bodwell v. North Andover, 110 Mass. 511, 512 (1872); Billings v. Worcester, 102 Mass. 329, 333 (1867); Horton v. Ipswich, 12 Cush. 488 (1853).

²³⁰ Acts, 1877, ch. 234.

²³¹ This provision, it is to be observed, is not incorporated in section seventeen of the statute.

²³² See Flanders v. Norwood, 141 Mass. 17 (1886); Rooney v. Randolph, 128 Mass. 580 (1880).

to negligence on the part of the responsible town. The broad, general effect of this provision, therefore, is to create a condition precedent which the injured person must satisfy by direct evidence or by proper inference.²³³

Whether or not the town has been guilty of negligence in any particular case is usually a question of fact for the jury to determine.²³⁴

§ 98. The Nature of the Duty to repair. Not avoided by Delegation. — The duty that rests upon towns in this Commonwealth to maintain their public ways in a reasonably safe condition for ordinary travel at all seasons, does not involve the exercise of judgment and discretion on their part. It does not rest with them to say whether or not it shall be performed. It is purely statutory and absolute in character.

Furthermore, it is the absolute duty of towns. The legislature has imposed it upon them for wise purposes of public policy, and they cannot, by any act of their own, shift it to other parties so as to relieve themselves from responsibility for its performance. They can, it is true, if they choose so to do, intrust this duty to third persons, but they are nevertheless bound at their peril to see that it is properly performed; by so doing they become responsible for the negligence, whether momentary or otherwise, of the persons so intrusted.²³⁵ Hence a municipal ordinance in which the duty properly to maintain the highway is placed upon abutting property owners cannot relieve the town from its liability

²³³ Murphy *v.* Worcester, 159 Mass. 546 (1883).

²³⁴ Rooney *v.* Randolph, 128 Mass. 580, 582 (1880).

²³⁵ Blessington *v.* Boston, 153 Mass. 409 (1891); Prentiss *v.* Boston, 112 Mass. 43, 48 (1873); Brooks *v.* Somerville, 106 Mass. 271, 274 (1871); Merrill *v.* Wilbraham, 11 Gray, 154 (1858). See also Woodman *v.* Metropolitan Railroad, 149 Mass. 335 (1889).

But in D'Amico *v.* Boston, 176 Mass. 599 (1900), it was held that where a city takes by right of eminent domain a large tract of land in another town, through which runs a highway that was discontinued, and contracts to secure a safe and convenient way over or around such highway till the completion of a new way, and the discontinued highway remains open and in continuous use by the public, with no notices posted, a person injured by a defect in such discontinued highway while using it before the new way was completed might recover damages from the city.

for any failure to perform this duty which results in injury to a traveller.²³⁶

§ 99. The Extent of the Duty to repair. Towns not Insurers. — Towns are not insurers of the safety of persons travelling upon their highways. They are not bound, therefore, to make their public ways absolutely safe for persons on foot or with ordinary vehicles under all circumstances,²³⁷ nor for persons with uncommon vehicles, as bicycles, under any circumstances,²³⁸ so as to preclude the possibility of accident; the law does not require them to anticipate unprecedented events and to provide against their possible occurrence, nor to make provision for vehicles of a different class from those referred to in the statute.

The whole extent of their duty, then, is simply to see that their highways are in a reasonably safe condition for travel in the ordinary modes both by night and in the daytime. Reasonable care and diligence under the circumstances is the only requirement.²³⁹

§ 100. How far the Duty to repair is Dependent on Notice. — Whenever defective conditions in the highway are caused by the operation of natural forces, or by the action of persons whose acts are neither directly nor constructively its own, no duty in respect to them arises until the town has had actual notice of their existence, or by the exercise of reasonable care and diligence might have had notice thereof, in time to have remedied them or to have prevented the injury complained of. But after it has had notice, either express or implied, of the existence of a defect or a want of repair, no matter how it was caused, the obligation at once arises to use reasonable care and diligence to restore the way so that it may again be reasonably safe for ordinary travel.²⁴⁰ And, as has been already indicated,²⁴¹ the town cannot escape responsi-

²³⁶ *Hayes v. Cambridge*, 138 Mass. 461 (1885).

²³⁷ *Bodwell v. North Andover*, 110 Mass. 511 n., 512 (1872).

²³⁸ *Rust v. Essex*, 182 Mass. 313, 314 (1902).

²³⁹ *Rooney v. Randolph*, 128 Mass. 580 (1880); *Flanders v. Norwood*, 141 Mass. 17 (1886).

²⁴⁰ *Hanscom v. Boston*, 141 Mass. 242 (1886); *Stanton v. Salem*, 145 Mass. 476 (1888); *Welsh v. Amesbury*, 170 Mass. 437 (1898).

²⁴¹ See § 98, *ante*.

bility for the performance of this duty by ordering private persons to make the necessary repairs.

§ 101. **The Effect of the Nature of the Use of the Way, upon the Duty to repair.** — The duty of towns is to maintain their highways so that they may be reasonably safe and convenient for travel in the ordinary modes at all seasons. In other words, they are bound to keep them in a safe condition for such uses as reasonable care and diligence could anticipate, having in view the exigencies of travel in the particular locality at the time.²⁴² “The obligation of these municipal corporations is, not to keep all their highways and bridges in the highest possible state of repair, or so as to afford the utmost convenience to those who have occasion to use them; but only in such condition that, having in view the common and ordinary occasions for their use, and what may fairly be required for the proper accommodation of the public at large in the various occupations which may from time to time be pursued, each particular way shall be so wrought, prepared and maintained that it may justly be considered, for all the uses and purposes for which it was laid out and designed, to be reasonably safe and convenient. . . . They are not required to make preparations for the safety or convenience of those who undertake to use those ways in an unusual or extraordinary manner, involving peculiar and special peril and danger, whether it be in respect to the kind or character of animals led or driven, or the magnitude or construction of carriages used, or the bulk or weight of property transported.”²⁴³ Thus, whether or not a town is liable for an injury resulting to an elephant from a defect in a highway over which it was being led depends upon whether the jury find that “an elephant, considered in reference to the time and place when and where, and the manner in which he was driven, was an animal suitable and proper to be driven” upon the highway.²⁴⁴

²⁴² *Gregory v. Adams*, 14 Gray, 242 (1859).

²⁴³ Mr. Justice Merrick in *Gregory v. Adams*, 14 Gray, 242 (1859), at pages 246 and 248.

²⁴⁴ *Gregory v. Adams*, 14 Gray, 242 (1859).

§ 102. The Effect of the Extent of the Use of the Way, upon the Duty to repair. — What is necessary in order to keep a highway reasonably safe for ordinary travel also depends in a measure upon the extent of the use to which it is put. It is of course plain that ways infrequently used require the exercise of less care and diligence on the part of a town in order to keep them reasonably safe than those in a populous place where travel is constant and heavy. This does not mean that the duty of towns relative to their public ways is changed in any degree by the extent of their use; that remains the same in every case, — to keep them reasonably safe at all times. It simply means that the question what is a reasonably safe way is a question of fact, depending upon all the circumstances, and that the quantity and variety of the travel over it constitute one of those circumstances which must be taken into consideration.²⁴⁵

§ 103. The Effect of the Extent of the Public Ways, upon the Duty to repair. — The extent of the highways of a town does not, of course, affect the degree of care that it is bound to bestow upon them: whether they extend for few or many miles, it must exercise such care over them all as shall keep them in a reasonably safe condition for travel in the ordinary modes. Nevertheless, the extent of the highways may have a material bearing upon the question whether or not, in any particular case, proper care was exercised. And the rule has become well settled in this Commonwealth that evidence of the number of miles of public ways within the defendant town, to which it must give equal attention, is competent upon that question.²⁴⁶

²⁴⁵ *Fitz v. Boston*, 4 Cush. 365 (1849). In this case, at page 368, Chief Justice Shaw says: "A street thickly built with shops and houses, crowded at once with heavy and bulky loads, lighter teams and wagons, horse wagons, market carts, and all the variety of light conveyances for the transportation of persons, going necessarily at different rates of speed, with the ordinary exigencies of frequent crossing, recrossing and stopping for purposes of business, at the various shops and houses, may require not only a wider, but a harder, smoother and more uniform surface to render the road safe and convenient."

²⁴⁶ *Sanders v. Palmer*, 154 Mass. 475 (1891); *Weeks v. Needham*, 156 Mass. 289 (1892).

§ 104. **The Effect of the Expense of maintaining the Public Ways, upon the Duty to repair.**—Since towns are not required to do unreasonable things in order to keep their highways reasonably safe and convenient for travel in the ordinary modes, the element of expense may have an important bearing upon the question what it is reasonable for them to do in that direction. It is not that there is one standard of duty for the wealthy city and another for the poor town. The standard of duty for them both is, of course, the same. But it is that that standard is the exercise of reasonable care and diligence — a standard that necessarily varies according to the circumstances of each case. And the element of expense of maintaining the highways is one of those circumstances. Thus, where a person was injured by being overturned and thrown from his sleigh by a snowdrift in the highway, it was held that the defendant town might show the actual cost of clearing the roads within its limits after the storm which caused the drift in question, and the estimated cost of clearing them if a way for travel had been opened along the middle of the road regardless of drifts, instead of around them as was done, together with the town valuation and the amount expended each year for the repair of highways.²⁴⁷

Upon the same ground, facts relating to the population of the town, the assessed valuation of the property therein, the rate of taxation and the amount of the appropriation for, and the amount expended upon, highways, have been held to be competent evidence.²⁴⁸

How minutely the parties shall be allowed to go into these,

²⁴⁷ Rooney v. Randolph, 128 Mass. 580 (1880). Hayes v. Cambridge, 136 Mass. 402 (1884); s. c. 138 Mass. 461 (1885), accord.

²⁴⁸ Sanders v. Palmer, 154 Mass. 475 (1891); Weeks v. Needham, 156 Mass. 289 (1892); O'Brien v. Woburn, 184 Mass. 598 (1904). In this last case the plaintiff was injured by stumbling over a water shut-off in the sidewalk. It was held that for the purpose of meeting evidence as to the amount of money that could be raised by taxation and the amount appropriated and expended for highways, and for the purpose of showing that the town had received from sources other than taxation sums of money which it had applied to remedy defects of the nature of this one, the plaintiff might show that the shut-offs were taken care of by the water department and not by the highway department and that the income of the water department exceeded its expenses.

and similar, collateral issues, is a matter within the discretion of the presiding judge.²⁴⁹

§ 105. The Effect of the Location within the Way of Roads operated by Private Corporations, upon the Duty to repair. — The fact that a railroad crosses or passes along a highway at grade, or that a street railway has laid its tracks through the streets, does not of itself relieve a town from its duty to repair, except in so far as it may be actually prevented from performing that duty by the necessary use of the tracks by such private corporations.²⁵⁰ As a general rule, therefore, a town is primarily liable for injuries resulting from defects in that part of a highway which is within the limits of the location of a railroad,²⁵¹ or of a street railway,²⁵² even though the defect is caused by the negligence of the agents of those corporations. But if the defect is due to matters which the proper construction and operation of such roads necessarily place it beyond the power of the town to remedy, there is no liability under this statute. Thus, if a private corporation has been duly authorized to cross a highway at grade, or to construct and operate its road through the streets, "the existence of its tracks properly constructed, and the proper

²⁴⁹ See *Sanders v. Palmer*, 154 Mass. 475 (1891).

²⁵⁰ *Davis v. Leominster*, 1 Allen, 182 (1861); *Jones v. Waltham*, 4 Cush. 299 (1849).

²⁵¹ *Pollard v. Woburn*, 104 Mass. 84 (1870); *Davis v. Leominster*, 1 Allen, 182 (1861).

²⁵² *Prentiss v. Boston*, 112 Mass. 43, 48 (1873); *Hawks v. Northampton*, 116 Mass. 420 (1875); *Bailey v. Boston*, 116 Mass. 423, n. (1875); *Lawrence v. New Bedford*, 160 Mass. 227 (1893); *Hyde v. Boston*, 186 Mass. 115 (1904).

"There is no presumption of law that a street railway obstructs the ordinary travel on the highway, or makes it dangerous." *Hawks v. Northampton*, 121 Mass. 10, 12 (1876).

As to the liability of street railway companies for injuries suffered during the construction, alteration, etc., of their railways, see Rev. Laws, ch. 112, § 44.

In *Whitcher v. Somerville*, 138 Mass. 454 (1885), it was held that a portion of the highway which was lowered for the purpose of allowing a railroad to pass over it, did not constitute an approach to the bridge within the meaning of Pub. Sts. ch. 112, § 128 (Rev. Laws, ch. 111, § 133), so as to make the railroad liable for an accident happening thereon, and that defendant town was liable for an injury due to a defect in such portion.

operation of its road, cannot be a defect in the streets for which the town is liable, even though they render the streets dangerous.”²⁵³ In such cases, therefore, the town is entitled to have the jury instructed that although portions of the construction of a street railway may present obstacles to travel and dangers to those using vehicles, yet if such portions are necessary to its operation as a street railway, they are not defects in the highway for which the town is liable.²⁵⁴

“ON THE PART OF THE COUNTY, CITY, TOWN OR PERSON”

§ 106. The Use of the Word “Person” in this Provision.
—“The mention of ‘persons’ in the statute, alongside of counties and towns obliged to repair, is easily explained.

—²⁵³ Lawrence v. New Bedford, 160 Mass. 227 (1893); Jones v. Waltham, 4 Cush. 299 (1849); Vinal v. Dorchester, 7 Gray, 421 (1856). See also Young v. Yarmouth, 9 Gray, 386 (1857), where the same rule was applied to the poles of an electric telegraph company.

—²⁵⁴ Fowler v. Gardner, 169 Mass. 505, 509 (1897).

Evidence upon the question whether the defect might have been remedied, or the injury prevented by the exercise of reasonable care and diligence on the part of the town: —

Similar Conditions. — Evidence which shows that a defect is likely to occur at any time from the operation of known forces is competent upon this issue. Thus, where the plaintiff received his injury by falling into a cesspool, the cover of which had floated off during a heavy rain, it was held that evidence showing that the cover had been off several times during the year before the accident, under similar circumstances, was admissible, and would warrant a finding that the town, with reasonable care, might have guarded against the injury. Post v. Boston, 141 Mass. 189 (1886).

The Expense of repairing the Highways. — Since towns are not required to incur unreasonable expense in order to keep their highways safe and convenient for travel, the element of expense is important as bearing upon the question what it is reasonably practicable for them to do. Hence, facts bearing upon the financial condition of the town and the amount expended for the repair of highways are competent. Rooney v. Randolph, 128 Mass. 580 (1880); Hayes v. Cambridge, 136 Mass. 402 (1884); s. c. 138 Mass. 461 (1885).

The Steps taken to remedy the Defect. — Evidence of steps actually taken by the town for the purpose of remedying the alleged defect is not admissible. If the town has not had reasonable time to remedy the defect, consistently with its duty to give due care to other places equally needing it, it is not liable, whether it has taken any steps or not. If it has had reasonable time, but has not remedied it, it is liable regardless of the steps taken. Payne v. Lowell, 10 Allen, 147 (1865).

The outline of our scheme was of ancient date and English origin. In England, while parishes were generally bound to repair highways and bridges, a person might be, *ratione tenuræ*, or otherwise. The language of our act was probably suggested by that of earlier legislation in England. But we cannot say, and probably the Legislature of 1786 could not have said, that there were no cases in the Commonwealth where persons other than counties or towns were bound to keep highways in repair. The words 'where other sufficient provision is not made therefor,' in the first section of the St. of 1786, imposing the duty on the inhabitants of towns, suggests that there were such cases. Even if there were not, it was a natural precaution to use the words.²⁵⁵

"BY LAW OBLIGED TO REPAIR THE SAME,"

§ 107. The Obligation to repair.—By the above provision the liability created by this statute is made subject to certain restrictions. In the first place, by the express terms of the statute which creates the obligation to repair,²⁵⁶ towns are, in the absence of some special provision, only liable for defects in those highways that lie within their own territorial limits. The duty to repair a portion of a highway that is outside of their territorial limits may, however, be imposed upon them by an award of county commissioners, in which case they will become responsible for injuries due to defects therein.²⁵⁷

And again towns are liable for injuries received in consequence of defects in their highways if, and only if, the obligation to repair has been imposed by law. If, therefore,

²⁵⁵ Mr. Justice Holmes in *Fisher v. Cushing*, 134 Mass. 374, 375 (1883).

This word "person" extends to and includes corporations. *Brookhouse v. Union Railway*, 132 Mass. 178, 180 (1882).

²⁵⁶ Rev. Laws, ch. 51, § 1. Highways, town ways, causeways and bridges shall, unless otherwise provided, be kept in repair at the expense of the city or town in which they are situated, so that they may be reasonably safe and convenient for travellers, with their horses, teams and carriages at all seasons.

²⁵⁷ *Whitman v. Groveland*, 131 Mass. 553 (1881).

other sufficient provision has been made for keeping a particular highway safe and convenient for travel, the town is entirely relieved from this liability with respect to it,²⁵⁸ even though it has assumed and performed the duty of repairing it.²⁵⁹ But this liability cannot be so limited by mere implication, save in so far as a town is actually deprived of the power to perform its duty.²⁶⁰

"HE MAY, IF SUCH COUNTY, CITY, TOWN OR PERSON HAD OR, BY THE EXERCISE OF PROPER CARE AND DILIGENCE, MIGHT HAVE HAD REASONABLE NOTICE OF THE DEFECT OR WANT OF REPAIR OR WANT OF A SUFFICIENT RAILING, RECOVER DAMAGES THEREFOR FROM SUCH COUNTY, CITY, TOWN OR PERSON;"

§ 108. The Effect of this Provision of the Statute. — This provision does not change the common law rule as to what constitutes reasonable care and diligence, but simply creates a condition precedent to the right of the injured person to recover.²⁶¹ As a general rule, therefore, the burden rests upon him to establish the fact that the precise defect which caused his injury was one of which the town had actual knowledge, or, by the exercise of reasonable care and diligence, might have had knowledge, in time to have remedied it or to have prevented the injury.²⁶² Unless knowledge, either actual or constructive, is established, towns are not liable in an action under this statute.²⁶³

²⁵⁸ Sawyer *v.* Northfield, 7 Cush. 490, 496, point 2 (1851); Wilson *v.* Boston, 117 Mass. 509, 512 (1875); Carter *v.* Boston & Providence Railroad, 139 Mass. 525 (1885).

²⁵⁹ Wilson *v.* Boston, 117 Mass. 509 (1875).

²⁶⁰ Davis *v.* Leominster, 1 Allen, 182 (1861); Jones *v.* Waltham, 4 Cush. 299 (1849).

²⁶¹ Blessington *v.* Boston, 153 Mass. 409, 412 (1891).

²⁶² Stanton *v.* Salem, 145 Mass. 476 (1888); Blake *v.* Lowell, 143 Mass. 296 (1887); Hanscom *v.* Boston, 141 Mass. 242 (1886); Welsh *v.* Amesbury, 170 Mass. 437 (1898).

²⁶³ Brummett *v.* Boston, 179 Mass. 26 (1901). In this case it appeared that the plaintiff was injured by the caving in of the sidewalk over which he was passing; that three or four days before the accident water worked its way from the street under the sidewalk and into the adjoining cellar; that employees of the water department took up the pavement in front of the sidewalk where the accident happened and stopped the flow of the water. It was held that there was no evidence that the city had, or by

Whether or not the town in the particular case had knowledge of the defect that caused the injury is commonly a question of fact for the jury to determine.²⁶⁴

§ 109. When Knowledge of the Defect need not be shown.— Towns, like natural persons, are considered to be chargeable with knowledge of their own acts and of acts ordered by them. Hence, whenever defective conditions in a public way are due to the acts of the town itself or of persons whose acts are constructively its own, the injured person need not prove knowledge thereof on its part.²⁶⁵

§ 110. Knowledge on the Part of Whom?—The knowledge on the part of the town of the existence of a defect in its highways, which this provision of the statute requires, is knowledge on the part of those of its officers who are charged with the duty of maintaining its public ways.²⁶⁶ It has been held that such knowledge on the part of one or more of the inhabitants of the town,²⁶⁷ and such knowledge on the part of the janitor of one of its public schoolhouses,²⁶⁸ was not knowledge of the defect on the part of the town within the meaning of this clause.

§ 111. Actual Knowledge of the Defect.—Actual knowledge of a defect in the highway is simply knowledge on the part of the proper officers of the town, acquired by personal observation, by communication from third persons or otherwise, of that condition of things which is alleged to constitute the exercise of reasonable diligence might have had, notice of the defect which caused the injury.

It may be noted that only the first clause of this provision is incorporated in section seventeen of the statute.

²⁶⁴ *Crosby v. Boston*, 118 Mass. 71 (1875).

²⁶⁵ *Brooks v. Somerville*, 106 Mass. 271 (1871).

²⁶⁶ *Donaldson v. Boston*, 16 Gray, 508, 511 (1860); *Howe v. Lowell*, 101 Mass. 99 (1869); *Crosby v. Boston*, 118 Mass. 71 (1875); *Blake v. Lowell*, 143 Mass. 296 (1887); *Hinckley v. Somerset*, 145 Mass. 326, 337 (1887).

Evidence of an entry, stating the existence of the defect, made by a police officer in a book kept for the purpose in the office used by the superintendent of streets, has been held admissible to show that the city had notice of the existence of the defect. *Blake v. Lowell*, 143 Mass. 296 (1887).

²⁶⁷ *Donaldson v. Boston*, 16 Gray, 508 (1860).

²⁶⁸ *Foster v. Boston*, 127 Mass. 290 (1879).

defect. Whether or not those officers, knowing the conditions, thought them to constitute a defect or considered them to be dangerous, is not material. Knowledge of the defective conditions is the only consideration.²⁶⁹

§ 112. Constructive Knowledge of the Defect. From what Facts it may be inferred.— The theory of the statute is plainly that lack of knowledge on the part of a town of the existence of a defect in the highway, under circumstances where it reasonably ought to have it, is equivalent to actual knowledge, so far as fixing its liability to a person injured by such defect is concerned.²⁷⁰ This theory rests upon the argument that the town officers charged with the duty of maintaining the public ways are bound to exercise reasonable care and diligence in order to make them safe and convenient for travel in the ordinary modes. The proper discharge of this duty necessarily involves the exercise of proper vigilance to dis-

²⁶⁹ Hinckley v. Somerset, 145 Mass. 326, 336 (1887); Pratt v. Cohasset, 177 Mass. 488 (1901).

Notice of a cause outside of a highway which is likely to produce at some time a defect within that highway, is not notice of the defect itself, if one results therefrom. Billings v. Worcester, 102 Mass. 329 (1869). And where the town dug a trench across the sidewalk, then filled it in again, but left it in such shape that the rain washed out the earth, so undermining the walk that it sank when the plaintiff stepped upon it, the court decided that it was going beyond the language and intention of the statute to hold the town liable upon the ground that its agents had constructed or repaired the way so negligently that it was reasonable to suppose that such a defect would be produced. Monies v. Lynn, 121 Mass. 442 (1877).

In Hutchins v. Littleton, 124 Mass. 289 (1878), the facts were that four days prior to the accident a hole came in the highway; that the defendant repaired it; that, by the action of the elements, the same hole was reopened or another made in the same place; that the plaintiff was injured by the second hole. The court held that if the first hole was insufficiently repaired, so that the road still remained out of repair, it would be a continuing defect and the town would be liable, even though the action of the elements had enlarged it and increased its dangerous character. But if it had been repaired so as to make the way safe and convenient, and a storm afterward produced a new defect in the same place, the town would not be liable unless such new defect was known to the town. "The fact that the new defect is connected with or related to or affected by the old does not change the rule of liability established by the statute."

²⁷⁰ Bourget v. Cambridge, 159 Mass. 388 (1893).

cover their condition. If, then, defects exist in them under such circumstances that those officers could not help knowing the fact if they had properly performed this duty, such knowledge should be imputed to the town. Constructive knowledge is, thus, that knowledge which the law imputes from the circumstances of the case.

The chief circumstances connected with the existence of a defect in the highway, from which knowledge thereof on the part of the town may be inferred, relate to the length of time prior to the accident during which it has existed; to the degree of its exposure to ordinary observation; to its situation with reference to the amount of travel over or near it; and to the extent of the near-by population.²⁷¹

The invariable and most essential of these circumstances is the length of time during which the defect has been in existence.²⁷² No precise length of time, however, can be fixed, as matter of law, which will be sufficient in every case to warrant imputing knowledge of the defect to the town. The law simply leaves it to the jury to determine in each particular case whether or not sufficient time had elapsed so that the proper town officers might, if they had exercised proper diligence, have had knowledge of the defect. It has been held, however, that such knowledge was properly imputed to the town where the defect had existed for one year or more before the accident happened;²⁷³ where it had existed between a month and a year;²⁷⁴ where it had existed

²⁷¹ *Bourget v. Cambridge*, 159 Mass. 388 (1893); *Whitney v. Lowell*, 151 Mass. 212 (1890); *Noyes v. Gardner*, 147 Mass. 505 (1888); *Fortin v. Easthampton*, 145 Mass. 196 (1887); *Purple v. Greenfield*, 138 Mass. 1, 7, point 2 (1884); *Donaldson v. Boston*, 16 Gray, 508 (1860); *Reed v. Northfield*, 13 Pick. 94 (1832). And see also *Chase v. Lowell*, 151 Mass. 422 (1890).

As to the effect of this clause where the alleged defect is a loose coal-hole cover, see *McGaffigan v. Boston*, 149 Mass. 289 (1889); *Hanscom v. Boston*, 141 Mass. 242 (1886); *Harriman v. Boston*, 114 Mass. 241 (1873); *Welsh v. Amesbury*, 170 Mass. 437, 440 (1898).

²⁷² *Whitney v. Lowell*, 151 Mass. 212 (1890); *Parker v. Boston*, 175 Mass. 501 (1900); *Dwyer v. Boston*, 180 Mass. 381 (1902).

²⁷³ *Lyman v. Hampshire County*, 140 Mass. 311 (1885).

²⁷⁴ *Purple v. Greenfield*, 138 Mass. 1 (1884).

between a week and a month;²⁷⁵ and where it had existed somewhat less than one day.²⁷⁶ It has been held also that such knowledge ought not to be imputed to the town where the defective condition had been in existence for one hour or less.²⁷⁷

The circumstance of the exposure of the defect to ordinary observation stands next in importance. If the defect is latent, so that it cannot be discovered by the exercise of due diligence on the part of the proper town officers, knowledge of it will not be imputed to the town.²⁷⁸ And the fact that no thorough examination of the part of the highway where the accident happened had been made for many years will not, in the absence of anything to indicate that one was necessary, alter this rule, even though it is clear that such an examination might have disclosed the defective conditions.²⁷⁹ If, however, causes are known to be in operation in or near the highway, which are likely to produce a defect therein, greater diligence may be required of the officers of the town. "It is reasonable that the officers should keep a more watchful eye over such a way in order to guard against danger. When, therefore, a defect is produced by some known, permanent cause which would naturally create the defect, the

²⁷⁵ Fortin *v.* Easthampton, 145 Mass. 196 (1887).

²⁷⁶ Bingham *v.* Boston, 161 Mass. 3 (1894).

²⁷⁷ Stoddard *v.* Winchester, 154 Mass. 149 (1891). In this case the court says: "The fact that a road is so constructed that it is not likely to keep in good condition for a great length of time, will not impose liability on the town which is bound to keep it in repair, unless the danger is so imminent that it can fairly be said to show a want of reasonable care and diligence to omit guarding against it at once."

²⁷⁸ Stoddard *v.* Winchester, 154 Mass. 149 (1891); Hoey *v.* Natick, 153 Mass. 528 (1891).

²⁷⁹ Miller *v.* North Adams, 182 Mass. 569 (1903). Here the injury was due to the plaintiff's horse breaking through the roadway into a culvert. It was held that the fact that no examination of the timbers had been made during twenty years was not enough to imply notice of the defect; that the probability that timbers would decay in the course of time, and that what did happen might sometime happen, was "far from constituting implied notice of the defect complained of; otherwise, since all roads and highways are liable to get out of repair at some time, towns and cities would be precluded from denying that they had notice of the want of repair at any given time."

existence of such cause may properly be considered by the jury in determining whether the officers of the town or city might have had notice of the defect by the exercise of proper care and diligence.”²⁸⁰ This rule, however, is limited in its application to cases where the danger to be guarded against is reasonably immanent in point of time. If, therefore, the known causes are likely to produce a defect in the highway only at some time in the remote future, the town cannot be held responsible on the ground of implied notice.²⁸¹

In order, therefore, to hold a town responsible under this statute on the ground of constructive knowledge, the defective condition must, as a general rule, be sufficiently open to observation so as fairly to indicate that danger may reasonably be apprehended at any time.²⁸² This does not necessarily mean, however; that the particular defect which caused the injury must in all cases be so notorious as to attract attention. Even though such defect was not apparent to ordinary observation, yet knowledge of it may be imputed to the town from the fact that for some time prior to the accident the highway at and near the place at which the injury was received was in a generally bad condition, or that there were particular defects of a similar nature in the immediate vicinity. The law imputes knowledge to the town in such cases apparently upon the theory that the fact of its neglect of the duty to make repairs, under circumstances where its performance of that duty would have led to knowledge of the particular defect, is enough to charge it with knowledge thereof.²⁸³ But the fact that there have been

²⁸⁰ Chief Justice Morton in *Olson v. Worcester*, 142 Mass. 536 (1886). *Post v. Boston*, 141 Mass. 189 (1886), accord.

²⁸¹ *Rochefort v. Attleborough*, 154 Mass. 140 (1891); *Stoddard v. Winchester*, 154 Mass. 149 (1891); *s. c.* 157 Mass. 567 (1893). See also *Fleming v. Springfield*, 154 Mass. 520 (1891).

²⁸² See *Stoddard v. Winchester*, 154 Mass. 149 (1891).

²⁸³ *Noyes v. Gardner*, 147 Mass. 505 (1888). In this case the defect consisted of a rotten plank in the sidewalk. This sidewalk was on one of the principal streets, was passed over daily by one of the selectmen, and had been for some time in bad condition, several of the planks being rotten. It was held that “while no one, so far as the evidence shows, had previously noticed the rottenness of the individual plank, by the

previous defects in the same place which were known to, and had been repaired by, the town is not a sufficient basis for imputing to it knowledge of another defect of the same general character existing at the same place but at a later time.²⁸⁴

The last circumstance of special importance, in respect to the question of constructive knowledge of the defect, relates to the extent of the use of the highway upon which the accident happened. While reasonable diligence is exacted of towns in the maintenance of every public way without regard to the amount of travel over it, what is reasonable diligence in any particular case depends in a measure upon the extent of the use to which the way is put. If the defect was on a street where there was but little travel and the population was light, reasonable diligence would require less care and watchfulness to discover it than if it was located on a street where travel was heavy and continuous and the population dense. Hence constructive knowledge of defective conditions in its highway cannot properly be imputed to a town, where such highway is comparatively unfrequented, until after the lapse of a longer time than would be required if the travel over it was more constant.²⁸⁵

The question whether or not, in any particular case, the defendant town had constructive knowledge of the defect that caused the injury is usually one of fact to be determined by the jury upon a consideration of all the evidence relating to the aforementioned circumstances, and to any other circumstance relevant to the issue.²⁸⁶

breaking of which the injury occurred, proper care and attention to the sidewalk would have revealed this, and a remedy could readily have been applied."

²⁸⁴ *Hutchins v. Littleton*, 124 Mass. 289 (1878).

²⁸⁵ *Noyes v. Gardner*, 147 Mass. 505, 508 (1888); *Welsh v. Amesbury*, 170 Mass. 437, 440 (1898).

But if the defect was insufficiently repaired, so that the road still remained out of repair, it would be a continuing defect, and the town would be liable, though the action of the elements had enlarged it and increased its dangerous character. *Blood v. Hubbardston*, 121 Mass. 233 (1876).

²⁸⁶ *Purple v. Greenfield*, 138 Mass. 1 (1884); *Welsh v. Amesbury*, 170 Mass. 437, 440 (1898).

Evidence upon the question whether the town had reasonable notice

"BUT HE SHALL NOT RECOVER FROM A COUNTY, CITY OR TOWN MORE THAN ONE-FIFTH OF ONE PER CENT OF ITS STATE VALUATION LAST PRECEDING THE COMMENCEMENT OF THE ACTION NOR MORE THAN FOUR THOUSAND DOLLARS,"

§ 113. The Burden of Proof under this Provision.— This provision of the statute, which in effect places a limitation upon the liability previously created, is in the form of a proviso standing apart from those provisions that create the liability. Following the general rule of construction in such cases,²⁸⁷ it is held that a plaintiff is not bound, in order to maintain his action, to offer evidence of the valuation of the defendant town; the burden of proving a valuation that

of the defect, or might have had notice thereof by the exercise of proper care and diligence: —

The Notoriety of the Defect.— All facts and circumstances which tend to show that the defect was generally known — such as the public character of the way, the nature of the defect itself, the time during which it had existed, and the like — may be introduced in evidence by the plaintiff upon the issue of notice. *Bourget v. Cambridge*, 159 Mass. 388 (1893), and cases cited under § 112. In *Chase v. Lowell*, 151 Mass. 422 (1890), where the plaintiff was injured by a defective shade tree, it was held that he might put in evidence not only the prominent location of the tree and the fact that a large number of citizens saw and noted its defective condition, but as well their declarations made while looking at it.

Such evidence is not competent, however, simply for the purpose of showing that certain inhabitants of the town had notice of the defect. *Hinckley v. Somerset*, 145 Mass. 328 (1887). It is valuable solely as forming the basis for an inference that the proper authorities knew, or with reasonable care might have known, of the existence of the defect.

Under this head may be included evidence of the existence of a permanent cause which would naturally produce the defect in question. Thus, where the defect was a ridge of ice extending over the sidewalk from the outlet of a water conductor, which had for a long time emptied the water from the roof of the adjacent building upon the sidewalk, it was held that the facts relating to the existence of this conductor might properly be considered by the jury upon the question of notice. *Olson v. Worcester*, 142 Mass. 536 (1886).

Resolutions and Reports of Town Officers.— It seems that resolutions and reports of officers of a town, though not evidence of the defective condition of a highway, may be competent evidence tending to show actual knowledge on the part of the town of the existence of the alleged defect. See *Collins v. Dorchester*, 6 Cush. 396 (1850).

²⁸⁷ See *Comm. v. Hart*, 11 Cush. 130, 134 (1853).

would cut down the liability below four thousand dollars rests upon the defendant.²⁸⁸ And furthermore it has been held that it was fair for the jury to assume, in the absence of evidence upon the point, that one-fifth of one per cent of the state valuation would amount to more than four thousand dollars.²⁸⁹

"AND NO ACTION THEREFOR SHALL BE MAINTAINED BY A PERSON WHOSE CARRIAGE AND THE LOAD THEREON EXCEEDS THE WEIGHT OF SIX TONS."

§ 114. The Effect of this Provision. The Burden of Proof under it. — This provision, which places a further limitation upon the liability previously created, does not have the effect of prohibiting the use of the highway for the transportation of burdens exceeding the weight prescribed. It simply puts upon the person who attempts so to use it all risk of loss and damage: he is deprived of all remedy against the town to recover compensation for injuries sustained, even though they were the direct result of a culpable defect in the highway.²⁹⁰

Since this clause of the statute is also in the nature of a proviso, it would seem that the general rule of construction, which in such cases places the burden of proof upon the defendant, would apply.²⁹⁰

SECTION 20. A person so injured shall, within ten days thereafter, if such defect or want of repair is caused by or consists in part of snow or ice, or both, and in all other cases, within thirty days thereafter, give to the county, city, town or person by law obliged to keep said way, causeway or bridge in repair, notice of the time, place and cause of the said injury or damage; and if the said county, city, town or person does not pay the amount thereof, he may within two years after the date of said injury or damage recover the same in an action of tort. Such notice shall not be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury, if it is shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby.

²⁸⁸ *Harris v. Quincy*, 171 Mass. 472 (1898).

²⁸⁹ See *Gregory v. Adams*, 14 Gray, 242, 248 (1859).

²⁹⁰ See § 113, *ante*.

§ 115. The Object and Effect of this Section of the Statute.—The obvious purpose of the provisions of this section is to afford towns an opportunity to investigate their liability in every case where an injury due to a defect in, or a want of repair of, a highway is alleged to have been sustained, at a time when the facts relating to the condition of the way and to the circumstances of the accident are more easily accessible. And the ultimate end thus secured to the towns is not alone the opportunity to settle without litigation such claims as may prove to be honest and well founded, but as well the opportunity to protect themselves more successfully from actions based upon fictitious claims.²⁹¹

Such being the object of the notice for which provision is here made, the giving of it is construed as constituting a strict condition precedent to the right to maintain an action for an injury suffered while travelling upon the highway: no liability under the statute arises until the notice is given.²⁹² So strictly is this construction applied that it has been held that the town itself cannot, if it would, waive compliance with this requirement.²⁹³

"A PERSON SO INJURED SHALL, WITHIN TEN DAYS THEREAFTER, IF SUCH DEFECT OR WANT OF REPAIR IS CAUSED BY OR CONSISTS IN PART OF SNOW OR ICE, OR BOTH, AND IN ALL OTHER CASES, WITHIN THIRTY DAYS THEREAFTER, GIVE TO THE COUNTY, CITY, TOWN OR PERSON BY LAW OBLIGED TO KEEP SAID WAY, CAUSEWAY OR BRIDGE IN REPAIR,"

§ 116. The Notice must be given within the Time Limit.—The notice of the accident, containing the required particulars of time, place and cause, must be given within the time here specified: if given after the expiration of that time, no action for the injury can be maintained under this statute, unless the injured person can show that he was unable, by

²⁹¹ See *Whitman v. Groveland*, 131 Mass. 553, 556 (1881).

²⁹² *Kenady v. Lawrence*, 128 Mass. 318 (1880).

²⁹³ *Gay v. Cambridge*, 128 Mass. 387 (1880); *Madden v. Springfield*, 131 Mass. 441 (1881).

These provisions as to notice apply to infants of tender years as well as to adults. *Madden v. Springfield*, 131 Mass. 441 (1881).

reason of physical or mental incapacity, to comply with the statutory requirement in this regard.²⁹⁴

§ 117. In what Cases Notice of the Accident must be given. — As indicated above, the notice of the accident here required must be given in every case where the injured person seeks to enforce this statutory liability for injuries sustained by reason of a failure to keep safe and convenient for ordinary travel a way which the defendant was by law obliged to repair. Hence not only towns, but railroad corporations²⁹⁵ and street railway companies,²⁹⁶ if bound by law to repair the way where the accident happened, are entitled to this notice before an action for damages can be maintained against them under this statute.

It follows that if a defendant was not by law obliged to repair the way where the accident happened, the omission to give this statutory notice will afford him no defence. Thus, an injured person can maintain an action against an abutter for an injury caused by a defect in his coal-hole, without first giving notice of the time, place and cause of his injury.²⁹⁷ So also where a person was injured by a defect in a sidewalk which had been laid out by the defendant upon his own land and paved continuously with the street so as apparently to form a part thereof.²⁹⁸

“NOTICE OF THE TIME, PLACE AND CAUSE OF THE SAID INJURY OR DAMAGE;”

§ 118. The Sufficiency of the Notice of the Accident. — The items of time, place and cause which this section of the statute requires to be set out in the notice of the accident, must all be stated,²⁹⁹ though not in any particular form of

²⁹⁴ Mitchell v. Worcester, 129 Mass. 525 (1880); Rev. Laws, ch. 51, § 21.

²⁹⁵ Mack v. Boston & Albany Railroad, 164 Mass. 393 (1895); Dickie v. Same, 131 Mass. 516 (1881).

²⁹⁶ Dobbins v. West End Street Railway, 168 Mass. 556 (1897).

²⁹⁷ Stevenson v. Joy, 152 Mass. 45 (1890).

²⁹⁸ Holmes v. Drew, 151 Mass. 578 (1890); Leahen v. Cochran, 178 Mass. 566 (1901).

²⁹⁹ Gardner v. Weymouth, 155 Mass. 595 (1892); and see Post o.

words. A written communication that sets them forth with reasonable fulness, and claims damages for the injury, so as to indicate that it was given for the purpose of fixing the injured person's right of action, will ordinarily satisfy the statutory requirements.³⁰⁰ The minuteness with which the items should be stated must depend very largely upon the circumstances of each particular case.³⁰¹ But the broad general rule is that the notice must be so reasonably specific as to time, place and cause as to be of substantial assistance to the officers of the town in investigating the case.³⁰²

The question of the sufficiency of a notice is one of law, to be determined by the court from an inspection of the whole communication.³⁰³ The rules of construction, however, are not to be applied to it with technical strictness.³⁰⁴

Foxborough, 131 Mass. 202 (1881), where the notice was held to be insufficient by reason of the omission of one of the required particulars.

** Harris *v.* Newbury, 128 Mass. 321, 325 (1880); Kenady *v.* Lawrence, 128 Mass. 318 (1880); McNulty *v.* Cambridge, 130 Mass. 275 (1881).

** Larkin *v.* Boston, 128 Mass. 521, 522 (1880); Donnelly *v.* Fall River, 132 Mass. 299, 301 (1882).

** Dalton *v.* Salem, 136 Mass. 278 (1884); Canterbury *v.* Boston, 141 Mass. 215 (1886).

In Pendergast *v.* Clinton, 147 Mass. 402 (1888), the following notice was held to be sufficient to satisfy the requirements of the statute: "To the inhabitants of the town of Clinton: You are hereby notified that on the 20th day of July, 1884, while driving down Union Street in Clinton, the wheel of the carriage in which I was riding struck a barrel placed in a hole in the highway, a little below the house occupied by Eri Richardson as a boarding-house, and nearly opposite a maple tree standing on the northerly side of said street, and in consequence I was thrown from the carriage and greatly injured. I claim of the town compensation for the injury received. J. P. by his attorney, C. G. S. Clinton, July 24, 1884."

** Shea *v.* Lowell, 132 Mass. 187 (1882); Lyman *v.* Hampshire, 138 Mass. 74 (1884).

** See Spellman *v.* Chicopee, 131 Mass. 443 (1881).

The fact that a town clerk upon whom a notice of the accident was served did not object to its insufficiency was not, prior to 1894, a waiver by the town of such insufficiency, as a matter of general law. Shea *v.* Lowell, 132 Mass. 187 (1882). See Rev. Laws, ch. 51, § 22. Any deficiencies in the written notice cannot be supplied by oral statements made to the officers of the town. Roberts *v.* Douglas, 140 Mass. 129 (1885).

§ 119. **The Statement of the Time of the Accident.**—As a general rule it is a sufficient compliance with this statutory provision to state in the notice of the accident simply the day, together with the month and year, upon which the injury was received. The hour of the day need not be set out, unless it appears that something depends upon the exact time of the accident.³⁰⁵

§ 120. **The Statement of the Place of the Accident.**—The place where the injury was received should be described in the notice of the accident with sufficient particularity to make it possible to locate, with reasonable certainty, the precise spot where it happened.³⁰⁶ Plainly this rule is not satisfied by simply naming the street upon which the person was travelling when the injury was sustained, especially if it be a street of any considerable length.³⁰⁷ The location should be made more exact by reference to near-by buildings,³⁰⁸ to another street,³⁰⁹ or to any natural object.³¹⁰

³⁰⁵ *Donnelly v. Fall River*, 132 Mass. 299 (1882); *Welch v. Gardner*, 133 Mass. 529 (1882); *Cronin v. Boston*, 135 Mass. 110 (1883).

³⁰⁶ *Lowe v. Clinton*, 133 Mass. 526 (1882); *McCabe v. Cambridge*, 134 Mass. 484 (1883); *Shallow v. Salem*, 136 Mass. 136 (1883); *Lyman v. Hampshire*, 138 Mass. 74 (1884); *Hughes v. Lawrence*, 160 Mass. 474 (1894).

Where the notice described the place of the accident as on a bridge, at a point where there was a hole caused by a short plank, which hole was so large that the plaintiff stepped into it, it appeared that the bridge was 218 feet in length, and that there were other holes of similar character, but only one capable of causing the accident. The court held that this was *prima facie* a sufficient description of the place, as it would naturally lead to an examination of the flooring of the bridge and so to the discovery of the defect. *Lyman v. Hampshire*, 138 Mass. 74 (1884).

³⁰⁷ *Larkin v. Boston*, 128 Mass. 521 (1880); *Donnelly v. Fall River*, 132 Mass. 299 (1882).

³⁰⁸ See *Pendergast v. Clinton*, 147 Mass. 402 (1888).

In *Post v. Foxborough*, 131 Mass. 202 (1881), the notice stated that the accident happened on a certain road between two houses, which were named. It appeared that the two houses were about a half-mile apart, with no other house intervening. It was held that this was not a sufficient statement of the place of the accident.

³⁰⁹ See *McCabe v. Cambridge*, 134 Mass. 484 (1883); *Sargent v. Lynn*, 138 Mass. 599 (1885).

³¹⁰ See *Welch v. Gardner*, 133 Mass. 529 (1882).

For a case where the place of the accident was three hundred yards

If, however, there should be any ambiguity as to this particular, the other statements contained in the notice may be considered in aid of the description of the place, and it is enough if the correct location of the spot where the accident happened can be determined from the communication as a whole.³¹¹

§ 121. The Statement of the Cause of the Accident.— The designation in the notice of that state of facts which constitutes the alleged defect by reason of which the injury was sustained is ordinarily a proper and sufficient statement of the cause of the accident within the meaning of this provision of the statute.³¹² In case the place of the accident is not identical with the place of the defect, the designation of those facts should be so complete as to indicate not only the nature of the alleged defect but also its locality.³¹³ Under this rule it is not enough merely to say that a person was injured "by reason of a defect in the highway,"— that is not a statement of the cause of the particular injury, but a

from the place of the defect which caused the injury, see *Miller v. Springfield*, 177 Mass. 373 (1901).

³¹¹ *Lowe v. Clinton*, 133 Mass. 526 (1882); *Sargent v. Lynn*, 138 Mass. 599 (1885).

³¹² *Taylor v. Woburn*, 130 Mass. 494 (1881); *Aston v. Newton*, 134 Mass. 507 (1883); *Grogan v. Worcester*, 140 Mass. 227 (1885); *Davis v. Charlton*, 140 Mass. 422 (1886); *Young v. Douglas*, 157 Mass. 383 (1892).

As to the interpretation of the words "the improper grading of said road" as a statement of the cause, see *Spooner v. Freetown*, 139 Mass. 235 (1885).

³¹³ *Miller v. Springfield*, 177 Mass. 373 (1901). In this case, at page 376, the court says: "Ordinarily the place of the injury is substantially identical with the place of the defect, and, when that is the case, a description of the nature of the defect, joined with a statement of the place of the injury, is a sufficient description of the cause of the injury. The object of the statutory notice, so far as respects the cause of the injury, is attained, when it enables the city to find with reasonable certainty the locality and nature of the alleged defect. But when the alleged defect is of the character complained of in this case, [a trough or too abrupt slope inside the rails of a street railway] and the place of the injury is three hundred yards from the alleged defective spot in the street, it is manifest that a statement, as to the place of the injury, gives no indication whatever as to the real cause of the injury, for it fails to point out the defect with which the wagon came in contact."

statement of "the general ground upon which a city in every case is liable for injuries sustained upon the highway."³¹⁴ So also the description of the cause simply as an obstruction in the highway, without stating its nature, is not sufficient.³¹⁵ But, if the defect itself is properly described, it is not necessary that the notice should go further and state the cause of that defect,³¹⁶ nor even allege that the condition of things described constituted a defect.³¹⁷

"AND IF THE SAID COUNTY, CITY, TOWN OR PERSON DOES NOT PAY THE AMOUNT THEREOF, HE MAY WITHIN TWO YEARS³¹⁸ AFTER THE DATE OF SAID INJURY OR DAMAGE RECOVER THE SAME IN AN ACTION OF TORT."

§ 122. The Right of Action not affected by this Provision.— It is not the purpose of this clause to require any delay in beginning an action, after the notice has been given. This is true, even though sufficient time is not allowed the town in which duly to call a town meeting, and thus legally to appropriate the money with which to pay the amount of the damage—the only way whereby it can legally avail itself of the privilege of a settlement which this provision would seem to hold out. As soon, therefore, as the notice is given, the right of action is complete, and may be immediately enforced.³¹⁹

³¹⁴ *Noonan v. Lawrence*, 130 Mass. 161 (1881); *McNulty v. Cambridge*, 130 Mass. 275 (1881); *Miles v. Lynn*, 130 Mass. 398 (1881); *Madden v. Springfield*, 131 Mass. 441 (1881); *Dalton v. Salem*, 131 Mass. 551 (1881). And see also *Bailey v. Everett*, 132 Mass. 441 (1882).

The naming in the notice as the cause of the accident that which does not constitute a defect, as stating the cause to be darkness, is not sufficient, the real cause being a depression in the sidewalk into which the plaintiff stepped owing to the darkness. *Lyon v. Cambridge*, 136 Mass. 419 (1884).

³¹⁵ *Roberts v. Douglas*, 140 Mass. 129 (1885).

³¹⁶ *Whitman v. Groveland*, 131 Mass. 553, 555 (1881).

A variance between the cause as stated in the notice and as proved at the trial is fatal, unless it also be shown that there was no intention to mislead, and that the town was not in fact misled, by the statement in the notice. *Bowes v. Boston*, 155 Mass. 344, 348 (1892); *McDougall v. Boston*, 134 Mass. 149 (1883).

³¹⁷ *Savory v. Haverhill*, 132 Mass. 324, 326 (1882).

³¹⁸ The action must be brought within two years. *Acts*, 1902, ch. 406.

³¹⁹ *Whitman v. Groveland*, 131 Mass. 553, 556 (1881).

"SUCH NOTICE SHALL NOT BE INVALID OR INSUFFICIENT SOLELY BY REASON OF ANY INACCURACY IN STATING THE TIME, PLACE OR CAUSE OF THE INJURY, IF IT IS SHOWN THAT THERE WAS NO INTENTION TO MISLEAD AND THAT THE PARTY ENTITLED TO NOTICE WAS NOT IN FACT MISLED THEREBY."

§ 123. **The Effect of this Provision.** — This clause does not relieve an injured person from the necessity of giving a notice of the accident, nor from the necessity of stating therein the required particulars of time, place and cause. Its only effect is to relieve from an inaccuracy in the statement of any of those particulars, when it appears that such inaccuracy was not intentional, and that the town was not misled thereby.³²⁰

§ 124. **What constitutes an Inaccuracy in stating the Required Particulars in the Notice of the Accident.** — The word "inaccuracy" as used in this provision covers an insufficiency of statement as well as an actual mistake.³²¹ "If there is a statement of the kind required which as to the time or the place or the cause of the injury is inaccurate, whether from falsity or deficiency, whether through omission or error, the plaintiff may still recover if there was no intention to mislead, and if the inaccuracy did not in fact mislead."³²² Thus it has been held that if the notice fails fully to describe the particular defect relied on, but there is evidence tending to show that the authorities of the town went to the spot indicated and found the actual defect that caused the injury, it would warrant a finding that the

³²⁰ *Gardner v. Weymouth*, 155 Mass. 595 (1892). See also *Carberry v. Sharon*, 166 Mass. 32 (1890).

This provision "can have no application where there is no statement at all; and this is true, whether the omission to make a statement relates to only one of the required particulars, or to all of them. Since the passage of the amendatory statute, as well as before, there must be, in regard to each particular, a statement such as would, if correct, be of substantial assistance to the authorities in the investigation of the claim." *Gardner v. Weymouth*, 155 Mass. 595, 597 (1892).

³²¹ *Fuller v. Hyde Park*, 162 Mass. 51, 54 (1894); *Gardner v. Weymouth*, 155 Mass. 595, 597 (1892), *semelie*.

³²² Mr. Justice Knowlton, in *Gardner v. Weymouth*, 155 Mass. 595, 597 (1892).

town was not in fact misled, and so cure the defect in the notice.³²³

An entire omission to state any one of the required particulars is not, however, an inaccuracy within the meaning of this provision, and hence it cannot be availed of in aid of a notice so defective.³²⁴

SECTION 21. Such notice shall be in writing, signed by the person injured or by some one in his behalf, and may be given, in the case of a county, to one of the county commissioners or the county treasurer; in the case of a city, to the mayor, the city clerk or treasurer; and in the case of a town, to one of the selectmen or to the town clerk or treasurer. If by reason of physical or mental incapacity it is impossible for the person injured to give the notice within the time required, he may give it within ten days after such incapacity has been removed, and in case of his death without having been for ten days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give the notice within thirty days after his appointment.

§ 125. The Notice of the Accident must be wholly in Writing. — An injured person cannot supply the deficiencies of his written notice by evidence showing that the officers of the town had oral information from himself, or from any other source, which pointed out more fully the time, place and cause of the injury. The notice cannot be partly oral and partly written: it must be wholly in writing.³²⁵ Evidence

³²³ *Liffin v. Beverly*, 145 Mass. 549 (1888).

For cases where the inaccuracy was in the description of the place of the accident, see *Veno v. Waltham*, 158 Mass. 279 (1893); *Connors v. Lowell*, 158 Mass. 336 (1893).

As bearing upon the question whether or not the town was misled, evidence of conversations in regard to the time, place and cause of the injury, had with officers of the town, is admissible. *Fortin v. Easthampton*, 142 Mass. 486 (1886).

³²⁴ *Gardner v. Weymouth*, 155 Mass. 595 (1892). And see also *Tobin v. Brimfield*, 182 Mass. 117 (1902). In this last case, at page 120, it was also held that evidence that the selectmen of the defendant town were misled by the notice was properly admitted. "The selectmen are the usual representatives of the town, and were acting for the town in this matter. If they were misled it might be inferred that the town was."

³²⁵ *Dalton v. Salem*, 139 Mass. 91 (1885); *Shea v. Lowell*, 132 Mass. 187 (1882).

of conversations in regard to the time, place and cause of an accident, had with officials of a town, is, however, admissible as bearing upon the question whether or not the town was misled by any inaccuracy in the written notice.³²⁶

§ 126. By whom the Notice of the Accident may be signed.—The notice of the time, place and cause of the accident, as expressly provided in this section, may be signed either by the injured person himself or by some one in his behalf. But when the signing is by a person other than the one injured, it should appear that it was done by him in behalf of such injured person.³²⁷ That it was so done need not, however, be stated in terms; it is enough if the fact can be gathered from the whole notice.³²⁸ Thus, where the husband of an injured woman signed his own name alone to the notice, it was held that, taking into consideration the relation of the parties and the presumption that the husband knew that the town was not responsible to him, but only to his wife, the fact that it was signed on behalf of the injured wife sufficiently appeared.³²⁹

§ 127. The Service of the Notice of the Accident.—The notice of the time, place and cause of the accident may be served by any person, by delivering the original to any one of the officials designated in this section, or it may be served by a public officer, by an attested copy.³³⁰

If such notice is delivered to any of the officials indicated in this section, the service is sufficient and complete. Thus, if it is given to one of the board of selectmen, that is a

³²⁶ *Fortin v. Easthampton*, 142 Mass. 486 (1886).

³²⁷ *Kenady v. Lawrence*, 128 Mass. 318 (1880); *Roach v. Somerville*, 131 Mass. 189 (1881).

³²⁸ *Carberry v. Sharon*, 166 Mass. 32 (1896); *Nash v. South Hadley*, 145 Mass. 105, 107 (1887); *Taylor v. Woburn*, 130 Mass. 494 (1881).

³²⁹ *Higgins v. North Andover*, 168 Mass. 251 (1897).

For cases where the injured person died within ten days after the accident, and the notice relied on at the trial was given within the thirty days after the injury by a person who afterwards became the legal representative of the deceased, see *Taylor v. Woburn*, 130 Mass. 494, 497 (1881); and *Nash v. South Hadley*, 145 Mass. 105 (1887).

³³⁰ *Whitney v. Lowell*, 151 Mass. 212 (1890); *Rev. Laws*, ch. 25, § 91.

sufficient service upon the town, even though that selectman fails to communicate it to the other members of the board.³³¹ And so if the notice is delivered in the city clerk's office, to the assistant clerk in the absence of the clerk, it is duly served upon the city.³³²

“IF BY REASON OF PHYSICAL OR MENTAL INCAPACITY IT IS IMPOSSIBLE FOR THE PERSON INJURED TO GIVE THE NOTICE WITHIN THE TIME REQUIRED, HE MAY GIVE IT WITHIN TEN DAYS AFTER SUCH INCAPACITY HAS BEEN REMOVED,”

§ 128. **Incapacity to give Notice of the Accident.** — When notice of the time, place and cause of the accident is not given within the time fixed in section twenty of the statute, the burden rests upon the plaintiff to establish the fact that the omission so to give the same was due to some physical or mental incapacity which made it impossible for him to give it.³³³ This burden is not sustained by evidence which shows simply that the injured person was not able, by reason of physical inability, to go in person and give the notice. It must be shown, in order that advantage may be taken of this provision, that there was such physical or mental incapacity as to make it impossible for him, by any ordinary means at his command, to procure the notice to be given.³³⁴

³³¹ *Taylor v. Woburn*, 130 Mass. 494 (1881).

In *McCarthy v. Dedham*, 188 Mass. 204, 206 (1905), the notice of the accident was left, between eight and ten o'clock in the evening of the last day within which due service could be made, at the house of one of the defendant's selectmen, the same being given to a domestic who came to the door and whose duty it was speedily to deliver it to her employer. This was held to be a sufficient service upon the defendant town. It was not necessary that the selectman “should have read the notice, or even have taken it into his hands that night. It would have been enough if it was placed somewhere in his immediate personal presence under his control, and he was conscious of it.”

³³² *McCabe v. Cambridge*, 134 Mass. 484 (1883). And see upon the same subject, *Wormwood v. Waltham*, 144 Mass. 184 (1887).

If the notice is addressed to the proper official of the town, in his official capacity, it is a good notice to the town. *Leonard v. Holyoke*, 138 Mass. 78 (1884); *Lyman v. Hampshire*, 138 Mass. 74 (1884).

³³³ *Mitchell v. Worcester*, 129 Mass. 525 (1880); *Lyons v. Cambridge*, 132 Mass. 534 (1882).

³³⁴ *Saunders v. Boston*, 167 Mass. 595 (1897); *Barclay v. Boston*, 167

It is thus a question for the jury to determine, under proper instructions, whether or not the plaintiff was actually incapacitated, physically or mentally, from giving the notice within the prescribed number of days.³²⁵

"AND IN CASE OF HIS DEATH WITHOUT HAVING BEEN FOR TEN DAYS AT ANY TIME AFTER HIS INJURY OF SUFFICIENT CAPACITY TO GIVE THE NOTICE, HIS EXECUTOR OR ADMINISTRATOR MAY GIVE THE NOTICE WITHIN THIRTY DAYS AFTER HIS APPOINTMENT."

§ 129. The Construction of this Provision.—In this provision the legislature has fixed the circumstances under which, and designated the person by whom, the notice of the accident shall be given in case the injured person has died without giving it, and the plaintiff who would avail himself of it must bring his case strictly within its terms. Therefore, where the injured person lived for more than ten days in such a condition that it was possible for him to give the notice but he neglected to do it, and the notice relied on at the trial was given within thirty days after his decease by his son, who was afterward appointed executor of his estate, it was held that it was not a sufficient notice within the meaning of this provision.³²⁶

SECTION 22. A defendant shall not avail himself in defence of any omission to state in such notice the time, place or cause of the injury or damage, unless, within five days after receipt of a notice, given within the time required by law and by an authorized person referring to the injuries sustained and claiming damages therefor, the person receiving such notice, or some

Mass. 596 (1897); *May v. Boston*, 150 Mass. 517 (1890); *Lyons v. Cambridge*, 132 Mass. 534 (1882); *Mitchell v. Worcester*, 129 Mass. 525 (1880).

³²⁵ *Welch v. Gardner*, 133 Mass. 529 (1882).

³²⁶ *Nash v. South Hadley*, 145 Mass. 105 (1887). But held differently under an earlier statute, see *Taylor v. Woburn*, 130 Mass. 494 (1881).

In *Barclay v. Boston*, 173 Mass. 310 (1899), it appeared that plaintiff's intestate died upon the twelfth day after her injury, without having given the notice of the accident; that before the expiration of ten days from the day of the accident, she became delirious and remained in that condition, unable to transact business, until her death. Held that on these facts her administrator might give the notice.

person in his behalf, notifies in writing the person injured, his executor or administrator, or the person giving or serving such notice in his behalf, that his notice is insufficient and requests forthwith a written notice in compliance with law. If the person authorized to give such notice, within five days after the receipt of such request, gives a written notice complying with the law as to time, place and cause of the injury or damage, such notice shall have the effect of the original notice, and shall be considered a part thereof.

§ 130. This Section does not shorten the Time for giving the Notice of the Accident.— The provisions of this section of the statute do not have the effect of shortening the time fixed by section twenty, within which the notice of the time, place and cause of the accident may be given. If, therefore, a sufficient notice is given to the town within the number of days named in section twenty, it is not material that the injured person was notified of the insufficiency of a previous notice of the accident and failed to give the new notice within five days as required by this section.³³⁷

³³⁷ *McLean v. Boston*, 180 Mass. 69 (1901). In this case it appeared that the plaintiff, who was injured on April 8, served on the town on April 30 a notice which omitted a statement of the place of the accident; that the town notified him on May 1 that his notice was insufficient; that the plaintiff on May 8 served a notice in all respects sufficient upon the town. The town requested the ruling that the plaintiff, having been served with a notification requesting a further written notice of the accident, and not having given such further written notice within five days of the receipt of the request therefor, could not recover. But the court held that the notice of May 8, having been given within the thirty days, was sufficient. "A sufficient notice given within thirty days is none the worse that the plaintiff has given an insufficient one before."

The provisions of this section, it may be observed, require the introduction of two new elements into the notice,—that it shall refer to the injury sustained, and shall claim damages therefor. These requirements are, however, inserted in a parenthetical sentence, and hence need not be stated in terms. "It is much more reasonable to suppose," says Mr. Justice Lathrop, in *Carroll v. New York, New Haven & Hartford Railroad*, 182 Mass. 237, 241 (1902), "that the parenthetical sentence was intended as a statement of the existing law, than as a new enactment. If the defendant's contention is correct, the Legislature has put the insertion in a notice of a claim for damages on a higher plane than the statement of the time, place and cause of the injury. We cannot suppose that this was the intention of the Legislature, or that the parenthetical clause means anything more than that it must appear from the notice

§ 131. This Section applies to an Omission, and not to an Inaccuracy, in the Notice of the Accident. What is an Omission.—The provisions of this section of the statute cover only the case of an omission to state in the notice of the accident any of the required particulars. If all of these particulars are set out in the notice and the only defect is an inaccuracy in stating them, no counter notification need be given by the defendant.³³⁸

The word "omission," consequently, is held to mean something else than mere insufficiency of statement.³³⁸ "An omission must be something more than a failure to state the precise spot of the accident with sufficient clearness. The failure must be an omission patent on the face of the document."³³⁹

that it was intended as a basis of a claim against the person to whom the notice is given."

— Tobin v. Brimfield, 182 Mass. 117 (1902). And see Gardner v. Weymouth, 155 Mass. 595 (1892).

— Chief Justice Holmes in Tobin v. Brimfield, 182 Mass. 117, 119 (1902). The court adds: "Without undertaking to lay down that whenever there is a reference to the place of the accident by any geographical description, however vague, the defect must be an inaccuracy and cannot amount to an omission, it is enough to say that in this case the notice went too far in the way of identification to be held to omit a statement of the place."

The section of the Public Statutes making provision for a tender to the injured person of the amount which he would be entitled to recover is omitted from the Revised Laws. See Pub. Sts. ch. 52, § 22, and Bacon v. Charlton, 7 Cush. 581 (1851).

As to the venue of actions under this statute, it is provided as follows: Rev. Laws, ch. 167, § 6. An action against a city, town or person to recover for injury or damage received by reason of a defect, want of repair or of an insufficient railing in or upon a highway, town way, causeway or bridge shall be brought in the county in which said city or town is situated or said person resides; but such action against the city of Boston may be brought in the county of Middlesex, or in the county of Norfolk or in the county in which the plaintiff resides, and such action against the town of Nantucket or against any town in the county of Dukes County may be brought in the county of Bristol.

As to changes in venue, see Rev. Laws, ch. 167, § 12. And see also Osgood v. Lynn, 130 Mass. 335 (1881).

CHAPTER II.

THE STATUTORY LIABILITY OF OWNERS AND KEEPERS OF DOGS.

REVISED LAWS, CHAPTER 102, SECTION 146. The owner or keeper of a dog shall be liable in an action of tort to a person injured by it in double the amount of damages sustained by him.

§ 132. **The Nature of the Liability.**— This statute does not make the owning or the keeping of a dog unlawful; it simply makes the owner or the keeper liable for the acts of his dog, giving all the damages to the person injured. It is, therefore, in its nature essentially a remedial, and not a penal, statute.¹

§ 133. **The Effect of the Statute. Scienter.**— At common law an action could not be maintained against an owner or a keeper of a dog without proof that the defendant knew that his dog was accustomed to attack and bite mankind.² The very essence of the liability was the keeping or owning of a ferocious dog, knowing its dangerous character. All this the statute has changed, enlarging the common law liability so far that it is no longer necessary to allege or prove that the defendant knew of the dangerous propensities of his

¹ *Le Forest v. Tolman*, 117 Mass. 109 (1875). *Mitchell v. Clapp*, 12 Cush. 278 (1853). It is not necessary to allege, therefore, that the injurious acts were done *contra formam statuti*. *Mitchell v. Clapp*, *ubi supra*.

This statute is of early origin. See Acts, 1791, ch. 38, § 4. It appears in practically its present form in Acts, 1798, ch. 54, § 3, and has been repeatedly re-enacted. See Rev. Sts. ch. 58, § 13; Gen. Sts. ch. 88, § 59; Pub. Sts. ch. 102, § 93.

Actions based upon this statute survive, under the provisions of Rev. Laws, ch. 171, § 1, the death of the defendant. *Wilkins v. Wainwright*, 173 Mass. 212 (1899).

² See *Popplewell v. Pierce*, 10 Cush. 509 (1852), and cases cited.

dog. The fact alone that the dog caused damage to a person is sufficient to fix the liability.³

§ 134. **Proximate Cause. Intervening Causes.** — The acts of the dog must be the sole proximate cause of the plaintiff's injury. The intervention, however, of a wholly unforeseen event or of the action of another animal will not necessarily break the causal connection. Thus, where the defendant's dog made a sudden rush at the plaintiff's horse, barking and leaping at his head, and thereby frightening him, and, while the driver was endeavoring to control him, the reins broke and in consequence the carriage struck against a post and the injury resulted, it was held that the attack of the dog was the sole proximate cause of the injury.⁴ And so, where the defendant's dog made a demonstration of attack upon the plaintiff's horse and frightened him so that he shied, upset the carriage, and injured the plaintiff, it was held that the shying of the horse, if due to the acts of the dog and not to any vicious habit of the horse, would not prevent the plaintiff from recovering.⁵

Likewise, an illegal act on the part of the plaintiff, provided such illegal act has no tendency to produce the assault or the consequent injury, will not constitute a contributing cause. Thus, where the plaintiff was injured by an attack of a dog, while travelling on the Lord's day in violation of the statutory provision,⁶ it was held that the act of travelling on that day was a mere condition, and did not in any way contribute to the injury.⁷

§ 135. **The Application of the Doctrine of Contributory Negligence.** — That the rule of law which requires the injured person to be in the exercise of due care at the time of his injury applies to actions under this statute, there can be no

³ *Pressey v. Wirth*, 3 Allen, 191 (1861); *Galvin v. Parker*, 154 Mass. 346 (1891), *semble*.

As to the degree of importance to be attached to the character of the dog under this statute, see § 142, *post*.

⁴ *Sherman v. Favour*, 1 Allen, 191 (1861).

⁵ *Denison v. Lincoln*, 131 Mass. 236 (1881).

⁶ Pub. Sts. ch. 98, § 3; repealed, Acts, 1887, ch. 391, § 4.

⁷ *White v. Lang*, 128 Mass. 598 (1880).

doubt, but to just what extent it applies has not yet, it appears, been definitely decided.⁸ Upon this question the court has said: "We have no doubt that where the plaintiff incites or interferes with a dog, and is bitten, his due care must be shown; and that the same is true where he interferes with two dogs that are fighting. . . . Whether the rule of contributory negligence should be applied in other cases need not now be decided."⁹

The same degree of care in the treatment of a dog cannot be exacted from a child as from a person of mature years, but only that degree which could reasonably be expected from a child of his age and capacity. Therefore treatment that would be a want of due care in a person of mature years may not be so in the case of a child.¹⁰ The thoughtlessness and heedlessness natural to childhood must be taken into account, and although the child may be old enough to know, if he stopped to reflect, that striking a dog would be likely to provoke him to bite, yet in striking him he may have been acting as a child of his age would ordinarily act under the same circumstances.¹¹

The degree of care exercised by the child's mother may also be an important consideration. For "if the child was

* *Raymond v. Hodgson*, 161 Mass. 184 (1894); *Boulester v. Parsons*, 161 Mass. 182 (1894); *Matteson v. Strong*, 159 Mass. 497 (1893); *Hathaway v. Tinkham*, 148 Mass. 85 (1888); *Plumley v. Birge*, 124 Mass. 57 (1878); *Munn v. Reed*, 4 Allen, 431 (1862).

The facts may show that the alleged negligence does not contribute to the injury, but is simply a condition. Such was held to be the case where the alleged negligence consisted in leading a horse behind a wagon. *Boulester v. Parsons*, 161 Mass. 182 (1894).

* *Raymond v. Hodgson*, 161 Mass. 184 (1894). *Boulester v. Parsons*, 161 Mass. 182 (1894), *semble*, accord.

It has been held that it could not be said as matter of law that a plaintiff who put his hand upon a dog in his custody in order to bring him along, and to prevent a fight with the defendant's dog, was negligent. "In cases of this kind a great deal depends on the size, the apparent disposition, the conduct and the situation of the two dogs, and upon other circumstances which are usually proper for the consideration of the jury." *Matteson v. Strong*, 159 Mass. 497 (1893).

¹² *Munn v. Reed*, 4 Allen, 431 (1862); *Plumley v. Birge*, 124 Mass. 57 (1878).

¹³ *Plumley v. Birge*, 124 Mass. 57, 58 (1878).

at the time of the injury in the custody and under the control of the mother, and she did not exercise that care and watchfulness over it which a person of mature years, having the custody of such a child, and standing in the relation to it which she did, ordinarily would, having reference to all the facts in the case, and the injury was caused in consequence of such want of care on the part of the mother, or if such want of watchfulness on her part contributed to the injury," the infant is not entitled to recover. It has been held under this rule that it was not *prima facie* evidence of a want of due care for a mother to allow her child to play with a strange dog.¹²

§ 136. **Where the Injured Person was a Trespasser.**—The fact that the injured person, at the time when he was attacked by the dog, was trespassing upon the premises of its owner or keeper does not necessarily preclude him from maintaining an action under this statute.¹³ It is commonly treated as a fact to be taken into consideration by the jury, in connection with all the other facts in the case, in determining the question of his due care. Thus, where the injured person, a junk-dealer, went upon the premises of the defendant and was in the act of taking up, without leave,

¹² *Munn v. Reed*, 4 Allen, 431 (1862).

"The burden of proof was on the plaintiff to show that at the time when he was bitten he was in the exercise of due care, and whether he was or not was a question of fact for the jury." *Spellman v. Dyer*, 186 Mass. 176, 178 (1904).

"See *Riley v. Harris*, 177 Mass. 163 (1900). The court, in the course of the opinion in this case, says: "On the one hand, it may be assumed that a burglar bitten by a dog would have no standing in court, as the use of the dog probably would have been a legitimate defence not excluded by the statute. On the other hand, if the plaintiff manifestly was threatening no harm and the dog was set upon her, or if it was kept with intent that it should attack all comers, the case might fall within the principle of the spring gun cases as explained in *Chenery v. Fitchburg Railroad*, 160 Mass. 211, 212, 213. In a case between the extremes just suggested, such as is presented by the facts before us fairly taken, where there was no malevolent intent on the defendant's part, it has been held that even there the fact that technically the plaintiff was trespassing would not prevent a recovery at common law for an injury by an animal known to be dangerous, and, on stronger grounds, under a statute like ours."

a rope which lay upon the grass when the dog bit him, it was held that he was a trespasser, and that such fact was properly submitted to the jury as bearing upon the question of his due care.¹⁴

§ 137. Application of the Statute to Injuries received outside State Limits. — It is a principle of the law of torts that, in order to maintain an action for an injury to the person, the act that is the cause of the injury and the foundation of the action must be actionable or punishable by the law of the place in which it was done.¹⁵ This rule is applied to actions based upon this statute. Thus, where the defendant was a resident of Massachusetts, and kept his dog at his home or place of business within the Commonwealth, but it strayed into New Hampshire and there injured the plaintiff, it was held that since the injury was done in New Hampshire and was not actionable or indictable by its laws, no action could be maintained in Massachusetts.¹⁶

“THE OWNER OR KEEPER OF A DOG”

§ 138. The Liability Several. Its Grounds. — Since the statute is in derogation of the common law, and there is no evidence of a contrary intention on the part of the legislature, this provision is strictly construed, and it is held that the liability of the owner and the keeper is not joint or several, nor both joint and several, but several only. The injured person must, therefore, if the owner and the keeper are different persons, elect which of them he will pursue, and, having made his selection, is bound by it. Thus, where

¹⁴ Spellman *v.* Dyer, 186 Mass. 176 (1904). Here, at page 178, the court says: “If there was an implied license to the plaintiff to enter on the premises in the usual course of his vocation, it was confined to such paths and means of entrance and exit as were provided for that purpose. It gave him no right to meddle with property, or to enter buildings, or to stray at large over the premises. He was technically at least a trespasser, as the judge told the jury, when he was taking up the rope, and it was for the jury to take that fact and all the other facts as found by them into account in passing upon the question of his due care.”

¹⁵ Bishop, Non-Contract Law, § 1280 (1889); Davis *v.* New York & New England Railroad, 143 Mass. 301 (1887).

¹⁶ Le Forest *v.* Tolman, 117 Mass. 109 (1875).

the plaintiff, having recovered a judgment for his injury against the owner of the dog, of which judgment he was unable to get satisfaction, brought suit against the keeper in order to recover for the same injuries, it was held that he was not entitled to maintain the action.¹⁷

The provision, however, affords two distinct grounds upon which an action under the statute may be maintained, namely, the owning and the keeping of a dog. The injured person may base his action upon the one ground or the other; or if he is in doubt whether the defendant was the owner or the keeper, he may set out both grounds in his declaration.¹⁸

§ 139. What constitutes a Keeper of a Dog.—Just what elements must be shown to exist in order to hold a person under this statute as keeper of the dog has not been fully decided. The later cases agree, however, that as matter of law it is not enough to show merely that the defendant temporarily harbored the dog, or that it was kept by its owner on the premises of the defendant with the knowledge or acquiescence or permission of the defendant; it must be made further to appear that the dog was on the premises for the benefit or in the interest of the defendant, or that some other element of an equally conclusive nature was involved in the case.¹⁹

¹⁷ *Galvin v. Parker*, 154 Mass. 346 (1891).

¹⁸ See *O'Donnell v. Pollock*, 170 Mass. 441 (1898).

The words "owner" and "keeper" when used in a declaration under this statute are considered to be descriptive averments, and must be strictly proved. *Buddington v. Shearer*, 20 Pick. 477 (1838).

"The issuing of a dog license has effect, as evidence of ownership in the licensee, only when knowledge is brought home to him in such a way as to connect him with it. The independent act of the town clerk, or the action of the clerk at the request of another party, is not evidence against the person named as licensee." *Jordan v. Carberry*, 185 Mass. 181, 182 (1904).

¹⁹ *Collingill v. Haverhill*, 128 Mass. 218 (1880); *McLaughlin v. Kemp*, 152 Mass. 7 (1890); *Whittemore v. Thomas*, 153 Mass. 347 (1891); *Boylan v. Everett*, 172 Mass. 453 (1899). In this last case the court says: "We do not think that if the defendants exercised some control over and had some custody of the dog, it therefore followed that the plaintiff was entitled to a ruling, as matter of law, that the defendants were responsible for him as keepers." Hence it was held that the court was not bound to rule, as matter of law, that "if the dog belonged to the

The question, therefore, whether or not the defendant was a keeper of the dog is commonly a question of fact to be submitted to the jury under proper instructions.²⁰

§ 140. **The Acts of the Dog.**— Not all of the acts of a dog, it seems, although an injury to a person may result from them, will render the owner or the keeper liable under this statute.²¹ To serve as the basis of an action, its acts must, as a general rule, constitute a direct attack, or at least something amounting to a demonstration of attack.²²

But provided its acts amount either to a direct attack or to a demonstration of attack, it is not material what kind of acts they are. They may consist of an actual assault, or of barking at, or jumping or running toward, the object of the attack; and although these acts be done at some distance from the object of the attack, the owner or the keeper of the dog may, nevertheless, be responsible for the consequences.²³

§ 141. **The Intent of the Dog.**— The intent with which the dog makes the attack or demonstration is not material; the liability under this statute remains the same whether it acts in a playful or a vicious mood. Thus, where a person was thrown down and injured by the defendant's dog leaping defendants' nephew, and he kept him on the defendants' premises with their consent, and they did anything to maintain or keep him, gave him food or protected him, or provided for him in any way, they would be, in the sense of the law, keepers of the dog." These facts may be evidence of keepership, more or less significant, but it cannot be said that they are conclusive.

"A wife is not necessarily, as matter of law, a keeper of dogs which her husband owns and keeps on premises which she owns, and which both occupy as husband and wife, although she carries on a separate business upon the premises." *McLaughlin v. Kemp*, 152 Mass. 7 (1890).

²⁰ *O'Donnell v. Pollock*, 170 Mass. 441 (1898); *Boylan v. Everett*, 172 Mass. 453, 457 (1899).

In *Barrett v. Malden & Melrose Railroad*, 3 Allen, 101 (1861), it appeared that the dog in question was kept at the defendant's car barns for several weeks prior to the injury by one of its employees, and that this was done with the knowledge and implied assent of its general superintendent. The court held that this evidence was sufficient to warrant the jury in finding that the dog was kept by the defendant.

²¹ *Sherman v. Favour*, 1 Allen, 191 (1861).

²² See *Denison v. Lincoln*, 131 Mass. 236 (1881); *Sherman v. Favour*, 1 Allen, 191 (1861).

²³ *Denison v. Lincoln*, 131 Mass. 236 (1881).

upon him, it was held that he was entitled to recover although it appeared that the dog did the act in play only.²⁴

§ 142. **The Character of the Dog.** — Although evidence of the character of the dog is not material, so far as the liability of the owner or the keeper under this statute is concerned,²⁵ yet it may be competent as tending to show that it did the acts in question. The law recognizes the fact that "animals are more likely to act in a certain way at a particular time, if the action is in accordance with their established habit or usual conduct, than if it is not. There is a probability that an animal will act as he is accustomed to act under like circumstances." It has been held, therefore, that evidence tending to show that the dog made other attacks upon other teams in like manner was admissible in order to show that it made an attack in the case before the court.²⁶

"SHALL BE LIABLE IN AN ACTION OF TORT TO A PERSON INJURED BY IT"

§ 143. **The Extent of the Liability.** — This statute is given a broad interpretation by the courts. It is consequently considered as providing a right of action to any human being who may sustain an injury by reason of the assault of a dog. The nature of that injury is not material: it may be either to the plaintiff's person or to his property.²⁷ The court in *Sherman v. Favour*²⁸ says of the statute in this regard: "It

²⁴ *Hathaway v. Tinkham*, 148 Mass. 85 (1888), point 3.

²⁵ See § 133, *ante*.

²⁶ *Broderick v. Higginson*, 169 Mass. 482 (1897). It was further held in this case that the habit of the dog might be proved by evidence of frequent observations of particular instances.

For a case involving the question of the use of a license issued prior to the injury as evidence of the identity of the dog that the defendant owned, in order to show that it was some other dog that caused the injury, see *Burns v. Stuart*, 168 Mass. 19 (1897).

²⁷ *M'Carthy v. Guild*, 12 Met. 291 (1874); *Brewer v. Crosby*, 11 Gray, 29 (1858); *Buddington v. Shearer*, 20 Pick. 477 (1838).

²⁸ 1 Allen, 191 (1861).

In *M'Carthy v. Guild*, 12 Met. 291 (1874), it was held that a father might maintain an action under this statute to recover for the loss of services, for the medical attendance and care, etc., of his minor son during an illness that was occasioned by the bite of the defendant's dog. The court in that case says: "We think the statute has only declared the

is general in its terms, and was doubtless intended to provide a remedy coextensive with the mischief, which any person might sustain by reason of any act of a dog, which occasioned injury to him or his property."

"IN DOUBLE THE AMOUNT OF DAMAGES SUSTAINED BY HIM."

§ 144. The Elements of Damage. — In an action under this statute, the plaintiff is entitled to recover not only for the physical pain and suffering, but also for any injury to his nervous system and for any loss in his mental or physical capacity. Any facts, therefore, tending to show a shock to the nervous system, as that the plaintiff, since the injury, has shown signs of fright and excitement at the sight of any dog, are competent.²⁹

§ 145. Doubling the Damages. — The practice with respect to doubling the damages has not been uniform. The amount awarded, therefore, may be doubled either by the court or by the jury. Hence no exception will be sustained to an instruction to the jury that after having ascertained the actual damage, they should render their verdict for double that amount.³⁰

general principle, giving double damages to any person injured by a dog, leaving us to recur to the principles of the common law, to ascertain the party legally entitled to recover for any particular injury, that may be the subject of an action. Giving the statute this construction, it provides an adequate remedy for the entire damages that may result from any such injury."

For a case where it was held that the plaintiff could not recover unless it was proved that the dog actually bit her, see *Searles v. Ladd*, 123 Mass. 580 (1878).

²⁹ *Roswell v. Leslie*, 133 Mass. 589 (1882).

Where the injury was done by two dogs together, only one of which belonged to the defendant, it was held that he was liable only for the mischief done by his own dog, even though there might be difficulty in ascertaining the amount of damage done by each dog. "If it could be proved what damage was done by one dog, and what by the other, there would be no difficulty; and on failure of such proof, each owner might be liable for an equal share of the damage, if it should appear that the dogs were of equal power to do mischief, and there were no circumstances to render it probable that greater damage was done by one dog than by the other." *Buddington v. Shearer*, 20 Pick. 477, 479 (1838).

³⁰ *Pressey v. Wirth*, 3 Allen, 191 (1861).

In *Wilkins v. Wainwright*, 173 Mass. 212 (1899), after a finding for

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the plaintiff and the assessment of double damages and while a motion for a new trial and a bill of exceptions were pending, the defendant died. His executrix claimed that, under Rev. Laws, ch. 172, § 2, only single damages could be recovered. But the court held that the provisions of that statute were not applicable to such a case as this, where the rights of the plaintiff were fixed before the death of the original defendant and nothing remained but to dispose of the motion and bill of exceptions and to enter up a judgment.

CHAPTER III.

THE STATUTORY LIABILITIES OF COMMON CARRIERS.

PART I.

THE LIABILITY OF RAILROADS AND STREET RAILWAYS FOR CAUSING THE DEATH OF PASSENGERS AND OTHERS.

REVISED LAWS, CHAPTER 111, SECTION 267. If a corporation which operates a railroad or a street railway, by reason of its negligence or by reason of the unfitness or gross negligence of its agents or servants while engaged in its business, causes the death of a passenger, or of a person who is in the exercise of due care and who is not a passenger or in the employ of such corporation, it shall be punished by a fine of not less than five hundred nor more than five thousand dollars which shall be recovered by an indictment prosecuted within one year after the time of the injury which caused the death, and shall be paid to the executor or administrator, one-half thereof to the use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin; but a corporation which operates a railroad shall not be so liable for the death of a person while walking or being upon its road contrary to law or to the reasonable rules and regulations of the corporation. Such corporation shall also be liable in damages in the sum of not less than five hundred nor more than five thousand dollars, which shall be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and shall be recovered in an action of tort, commenced within one year after the injury which caused the death, by the executor or administrator of the deceased for the use of the persons hereinbefore specified in the case of an indictment. If an employee of a railroad corporation, being in the exercise of due care, is killed under such circumstances as would have entitled him to maintain an action for damages against such corporation if death had not resulted, the corporation shall be liable in the same manner and to the same extent as it would have been if the

deceased had not been an employee. But no executor or administrator shall, for the same cause, avail himself of more than one of the remedies given by the provisions of this section.¹

¹ The earliest act dealing with this subject is the statute of 1840, ch. 80. Its provisions simply give a remedy by indictment against the "proprietor or proprietors of any railroad, steamboat, stage coach, or of common carriers of passengers" for causing the death of a person "being a passenger." The law stood in this form, without change, until 1853, when an act was passed embodying the provisions of the statute of 1840, ch. 80, but applying them to railroads alone. Acts, 1853, ch. 414. This act, however, not merely re-enacted those provisions, but so extended the scope of the original as to cover cases where "the life of any person not being a passenger or employee" but being in the exercise of due care and not upon the railroad contrary to law or the reasonable rules of the company, was lost. This same act also first introduced the limitation, which was retained in all subsequent legislation upon the subject, whereby the proceedings are required to be commenced within one year from the time of the injury.

In the general revision of the statutes in 1860, the provisions of the statute of 1840, ch. 80, as specifically applied to railroads alone by statute of 1853, ch. 414, were re-enacted without substantial change, Gen. Sts. ch. 63, § 97; while the provisions relating to persons not passengers or employees, which were introduced in the statute of 1853, ch. 414, were embodied in a separate section, Gen. Sts. ch. 63, § 98.

The provisions of the statute of 1840, ch. 80, so far as they related to the other carriers named therein, were re-enacted with only slight changes of phraseology. Gen. Sts. ch. 160, § 34.

Two years later the legislature combined into one section the provisions of General Statutes, ch. 63, §§ 97 and 98, and applied them specifically to street-railway corporations, the only change being that this act required in terms that the passenger, as well as the person not being a passenger, should be "in the exercise of due care." Acts, 1864, ch. 229, § 37. When the street-railway laws were revised in 1871, these provisions were re-enacted, substantially in the same form. Acts, 1871, ch. 381, § 49.

In that same year also the first act was passed giving a remedy where "a person is injured in his person or property by collision" at a grade crossing, provided the corporation neglected to give the statutory signals and such neglect contributed to the injury, the injured party not being himself grossly or wilfully negligent, or acting in violation of law, so as to contribute to his own injury. Acts, 1871, ch. 352.

When the revision and consolidation of the acts relating to railroads was made in 1874, the provisions of General Statutes, ch. 63, §§ 97 and 98, were combined and incorporated without the addition of any new element, in a single section. Acts, 1874, ch. 372, § 163. The provisions relating to injuries received by collision at railroad crossings, as enacted in the statute of 1871, ch. 352, were re-enacted, with no material change, in section 164 of the same chapter.

No further change was made in these enactments until the statute of

§ 146. The Liability of Common Carriers for causing Death is purely Statutory. — The common law does not regard the death of a human being as a matter that can be complained of as an injury to third persons; hence it recognizes no civil liability under any circumstances as resting upon a railroad corporation or a street railway company for causing the death of a passenger or other person.² Consequently all actions

1881, ch. 199, was passed. This act made important changes in the law as it had stood up to that time. Section one gave a remedy by action of tort against railroad companies, to be brought by the executor or administrator of the deceased, where the life of a passenger or of one not a passenger or employee but in the exercise of due care, was lost; and section two gave the same remedy where the life of a person was lost by collision at a grade crossing. Section three re-enacted without change, save as to the remedy which was also to be by action of tort brought by the executor or administrator, the provisions of the General Statutes, ch. 160, § 34, relative to carriers other than railroads or street railways. This act further provides that this new remedy shall be taken advantage of within one year from the date of the injury, and that it shall not be availed of in connection with the remedy by indictment. Here is also first introduced the provision that the amount of damages shall be assessed with reference to the degree of culpability of the corporation, or of its servants or agents. §§ 5, 6.

In the general revision of the statutes in 1882, the provisions of the statute of 1874, ch. 372, § 163, relative to railroads, and of the statute of 1871, ch. 381, §§ 49, 50, as to street railways, were blended together and embodied in the first portion of chapter 112, section 212, of the Public Statutes, while sections one, five, and six of chapter 199 of the Acts of 1881 were combined and enacted in the latter part of the same section. The following section is a re-enactment of the provisions of the statute of 1874, ch. 372, § 164, as amended by the statute of 1881, ch. 199, § 2. Pub. Sta. ch. 112, § 213. Section three of chapter 199 of the Acts of 1881, relating to carriers other than railroads and street railways, is re-enacted in Public Statutes, ch. 73, § 6.

The only changes made since the enactment of the Public Statutes have been simply to extend the right of action against railroads to employees who are killed under the circumstances specified, Acts, 1883, ch. 243, and to extend the liability to street-railway companies, Acts, 1886, ch. 140.

Throughout this series of statutes culminating in Revised Laws, ch. 111, § 267, and ch. 70, § 6, the remedy, whether by indictment or by action of tort, is given when the life is lost by the negligence of the corporation or by the gross negligence of its servants or agents. The limits of the amount that may be recovered, and the manner in which such amount is to be distributed, also remains unchanged throughout.

² *Carey v. Berkshire Railroad*, 1 *Cush.* 475 (1848); *Holland v. Lynn & Boston Railroad*, 144 *Mass.* 425 (1887); *Gunn v. Cambridge Railroad Company*, 144 *Mass.* 430 (1887).

against such corporations, based upon the death of a person under the circumstances described in this statute must be brought under its provisions; and they will be deemed to be so brought even though the declaration does not contain all of those allegations that are essential to an action under the statute.³

§ 147. The Nature of the Statutory Liability for causing Death. — In substance the provisions of this section are penal. It is their primary purpose to impose a penalty upon railroad corporations and street railway companies as a punishment for their own negligence, or for the unfitness or gross negligence of those employed by them; yet it differs from purely penal legislation in that the amount of the fine is given, not to the Commonwealth, but to the personal representatives of the deceased, to be by them applied solely for the benefit of the widow and children, or of the next of kin, as the case may be.⁴

The penal aspect of the section is not in the least altered or affected by those provisions which authorize proceedings by action of tort instead of by indictment: the former method of procedure is merely a substitute for the latter.⁵

Since this liability is in essence and effect of a penal nature, a corporation operating a railroad or a steam railway cannot secure a release from it by any agreement made with the

³ *Hicks v. New York, etc. Railroad*, 164 Mass. 424, 429 (1895).

⁴ *Comm. v. Boston & Lowell Railroad*, 134 Mass. 211 (1883); *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510 (1904).

Since the statute is penal in its nature and general purposes, an action based upon it cannot be maintained in the federal courts, either where the deceased was a passenger, *Lyman v. Boston & Albany Railroad*, 70 Fed. Rep. 409 (1895), or where he was an employee, *Perkins v. Boston & Albany Railroad*, 90 Fed. Rep. 321 (1898).

⁵ *Littlejohn v. Fitchburg Railroad*, 148 Mass. 478, 482 (1889). In this case Mr. Justice Holmes says: "The present action is statutory and penal in character. The statute does not extend the liability for personal injuries to those injuries which cause death, as in *Little v. Dusenberry*, 17 Vroom, 614. It creates a liability of a different nature. The action which it gives to the administrator is merely a substitute for the indictment also provided for, and it is expressly enacted that the damages shall be 'assessed with reference to the degree of culpability of the corporation, or of its servants or agents.'"

deceased prior to the accident.⁶ Thus, where the deceased was killed while travelling upon a ticket upon the back of which was printed the stipulation that the railroad should not be liable under any circumstances for the personal injury of the person who accepted and used it, the court held that that agreement did not release the corporation from the liability imposed by this section.⁶

§ 148. The Liability not confined to Cases of Instantaneous Death. — Although perhaps the most obvious field for the application of the provisions of this statute is where the deceased was instantly killed, the liability is not confined to such cases. Those cases where the death did not immediately follow the injury are also held to come within its terms, even though in that class of cases an action at common law for the conscious suffering may survive,⁷ provided the ultimate death was a direct result of that injury.⁸ This construction is based upon the fact that the object of the statute is not merely, nor even primarily, to secure compensation to the relatives of the deceased, but to punish the railroad corporation or street railway company for its negligence.⁷

“ IF A CORPORATION WHICH OPERATES A RAILROAD OR A STREET RAILWAY, BY REASON OF ITS NEGLIGENCE OR BY REASON OF THE UNFITNESS OR GROSS NEGLIGENCE OF ITS AGENTS OR SERVANTS WHILE ENGAGED IN ITS BUSINESS,”

§ 149. “Which operates a Railroad or a Street Railway.”— These words do not limit the liability to death occasioned by moving trains, or by locomotives or cars in actual operation, nor to accidents happening upon railroad or street railway tracks. They were not intended to confine the operation of the statute to cases where the corporation was at the time of the

* Doyle v. Fitchburg Railroad, 162 Mass. 66, 71 (1894); Comm. v. Vermont & Massachusetts Railroad, 108 Mass. 7, 12 (1871).

⁷ Comm. v. Metropolitan Railroad, 107 Mass. 236 (1871).

And the recovery of a judgment for the conscious suffering will not bar an action under this section for the death. Clare v. New York & New England Railroad, 172 Mass. 211 (1898).

⁸ See Daniels v. New York, New Haven & Hartford Railroad, 183 Mass. 393 (1903).

accident actually engaged in operating a railroad or a street railway in the popular sense of that phrase. They are rather words of description, designating the kind of corporation intended to be subjected to the liability. Thus, where the deceased was killed while engaged in transferring coal from a vessel to the defendant's freight cars to be forwarded over its road, it was held that the defendant was, while engaged in that operation, a corporation operating a railroad within the meaning of this provision.⁹

§ 150. The Negligence of the Corporation Distinct from the Gross Negligence of its Agents. — In this provision a clear distinction is drawn between the negligence of the corporation itself, and the gross negligence of its servants or agents. This distinction has been observed and often emphasized in the cases that have been decided under the statute, and has been productive of an important consideration. That consideration is that, since the negligence of the corporation is one distinct thing, and the gross negligence of its servants is another, the plaintiff must select and accurately set forth in his pleading, whether it be an indictment or a declaration, upon which of these two alternatives he intends to rely; and he must then support the alternative selected by proof strictly applicable thereto. It follows, therefore, that an averment in his pleading of the first of these grounds is not supported by evidence tending to establish the second ground: the court will not infer the existence of negligence on the part of the corporation from proof of negligence on the part of its unofficial servants or agents,¹⁰ and if he fails to allege facts

⁹ Daley *v.* Boston & Albany Railroad, 147 Mass. 101, 112 (1888).

¹⁰ Comm. *v.* Boston & Maine Railroad, 133 Mass. 383, 384 (1882); Comm. *v.* Fitchburg Railroad, 120 Mass. 372 (1876).

"The negligence of the corporation itself is one thing, and the gross negligence of its servants or agents is another thing, and an averment of one is not supported by proof of the other. In many cases, it is true that, as a corporation usually acts by agents, an averment of negligence on the part of a corporation may be supported by proof of negligence on the part of its agents. But this is not applicable to a liability imposed by a statute which expressly distinguishes between the grounds of liability, as does the statute now under consideration. In such a case as the present, negligence on the part of the corporation cannot be established by show-

showing either the one ground or the other, his pleading is bad on demurrer.¹¹

§ 151. **The Negligence of the Corporation itself.** — The operation of this statute is not confined to any particular kind of negligent acts, but covers the omission to perform any and every duty that a corporation which operates a railroad or a street railway owes to the public. As was said by Mr. Justice Gray in *Commonwealth v. Boston & Worcester Railroad*,¹² "The negligence or carelessness which is thus made criminal is not confined to the omission to comply with specific requirements of the statutes of the Commonwealth, but extends to any want of reasonable care which would give the party injured, if not immediately killed, a right of action against the corporation." Thus, where suit was brought for the purpose of enforcing a liability under this statute for causing death by a collision at a crossing of a highway at grade, it was held that the liability of the corporation might be established by showing that it had omitted to take such extra precautions to warn travellers as the circumstances required, — such, for example, as the erection of gates, or the stationing of a flagman, at the crossing.¹³

The test for determining the question whether or not the failure to take some such extra precaution was negligence in any particular case is, Does the safety of the public reasonably require such precaution? It is, therefore, usually a question of fact for the jury in each case whether the warnings required by the statutes¹⁴ were sufficient to protect the public, or whether additional precautions ought to have been taken. But "in order to authorize a jury to find negligence in not taking such additional precautions, there must be evidence beyond the mere fact that there is a public way crossed

ing negligence on the part of its servants or agents, and by invoking the aid of a presumption that their negligence must be presumed to have been in pursuance of orders of the corporation itself." Mr. Justice C. Allen in *Comm. v. Boston & Maine Railroad*, 133 Mass. 383, 385 (1882).

¹¹ *Gay v. Essex Electric Street Railway*, 159 Mass. 242 (1893).

¹² 101 Mass. 201 (1869).

¹³ *Hubbard v. Boston & Albany Railroad*, 162 Mass. 132 (1894).

¹⁴ See Rev. Laws, ch. 111, §§ 188, 190.

by a railroad at grade. There must be something in the configuration of the land, or in the construction of the railroad, or in the structures in the vicinity, or in the nature or amount of the travel of the highway, or in other conditions, which renders ringing the bell and sounding the whistle inadequate properly to warn the public of danger.”¹⁵

§ 152. **The Gross Negligence of the Agents or Servants.**

— The distinction, indicated in this provision, between negligence and gross negligence is to be noted. The liability of the corporation under this statute for the negligence of its agents or servants arises only when that negligence is gross. Hence, where the plaintiff bases his action upon the negligence of the agents or servants of a railroad corporation or of a street railway company, he must both allege and prove that such negligence was gross¹⁶ — evidence tending to show ordinary negligence will not sustain this burden of proof.¹⁷

¹⁵ *Hubbard v. Boston & Albany Railroad*, 162 Mass. 132, 135 (1894), and see also *Comm. v. Boston & Worcester Railroad*, 101 Mass. 201 (1869).

¹⁶ “There is perhaps no term of which it is more difficult to give a practically useful definition, or even to form a practical conception, than this term ‘gross negligence’ as used in the statute under which this action is brought, especially when the dividing line between that and what is called ordinary negligence is to be drawn. . . . The line between due care and negligence may be stated clearly enough for the practical administration of the law, but when one leaves the shore of due care and plunges into the sea of negligence, how far out can he go before he crosses the dividing line between what is called ordinary negligence and gross negligence? The most that can be said, perhaps, is that gross negligence is further from due care than ordinary negligence, but that is not entirely satisfactory. Still the dividing line is left undisclosed, for how far out does ordinary negligence extend? We are sensible of the danger of drawing the line too near to due care, and of finding gross negligence where only ordinary negligence exists. Each case, however, must be decided according to its peculiar features.” Mr. Justice Hammond in *Evensen v. Lexington & Boston Street Railway*, 187 Mass. 77, 79 (1904).

¹⁷ *Hicks v. New York, etc. Railroad*, 164 Mass. 424, 429 (1895); *Comm. v. Boston & Maine Railroad*, 133 Mass. 383 (1882); *Comm. v. Fitchburg Railroad*, 120 Mass. 372 (1876); *Gordon v. West End Street Railway*, 175 Mass. 181 (1900). See also *Chisholm v. Old Colony Railroad*, 159 Mass. 3 (1893); *Merrill v. Eastern Railroad*, 139 Mass. 238 (1885); *Byron v. Lynn & Boston Railroad*, 177 Mass. 303 (1901).

Where the deceased had one foot upon the running-board of an open car in the act of getting on when the conductor, who was where he could

§ 153. "**While engaged in its Business.**" — These words include all acts which are reasonably incident to the business of the corporation, whether done upon its own tracks or upon the tracks of other corporations. For it makes no difference that the accident happened upon tracks which were owned by other corporations, and were not within the chartered limits of the road of the defendant corporation or of any road under its control, provided that the defendant corporation had, with the consent of the owner, the actual use and occupation of such tracks at the time of the accident.¹⁸

And all the acts of the agents or the servants of a railroad corporation or of a street railway company, which properly come within the scope of their employment, are within the meaning of these words. Thus, where the deceased was killed by being knocked from the defendant's street car, upon which he was riding as a passenger, by reason of the negligent manner in which the driver of the car, who had just been relieved from duty, stepped from the platform as he was leaving to get his dinner, it was held that the driver while leaving the car was acting within the scope of his employment and was at that time engaged in the company's business.¹⁹

"CAUSES THE DEATH OF A PASSENGER,"

§ 154. **When the Relation of Passenger and Carrier arises.** — The acts necessary to establish the relation of passenger and carrier are the same under this statute as at common law.²⁰ In any case they are rarely, on either side, of such a character as to constitute a formal bailment of the person by the trav-

see, gave the signal to start the car and the accident followed, it was held that "with regard to gross negligence we are not prepared to say that the jury were not warranted in finding it." *Gordon v. West End Street Railway*, 175 Mass. 181 (1900).

Railroad corporations are not responsible for the acts or omissions of persons or companies doing an express business over their lines, or of the agents or servants of such persons or companies. Rev. Laws, ch. 111, § 269.

¹⁸ *Comm. v. Boston & Lowell Railroad*, 126 Mass. 61 (1878).

¹⁹ *Comm. v. Brockton Street Railway*, 143 Mass. 501 (1887).

²⁰ See *Young v. New York, etc. Railroad*, 171 Mass. 33, 35 (1898).

eller, or a formal acceptance by the carrier. As was said by Mr. Justice Knowlton in *Webster v. Fitchburg Railroad*:²¹ "The existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for until the trip is begun, and then to be carried over the railroad." The "circumstances" here referred to relate mainly to the time, the place or position, and the manner in which the person presents himself to be carried on the contemplated journey; the fact that he has, or has not, purchased a ticket is at best nothing more than a make-weight in the determination of the question.²² Has the person presented himself, with a *bona fide* intention of becoming a passenger, under such circumstances relative to time, place and manner that the carrier must be deemed to have accepted him as a passenger? This is the test question.²³

As applied to steam railroads, it has been held under this statute, relative to place, that a person who was killed by an engine while walking toward a railroad station with the intention of buying a ticket and taking a train after he reached there, was not at the time of the accident in such a place as to become a passenger.²⁴ But a person who has mounted the platform on his way into a car of a train which was at rest at the station, has been held to have gone far enough, as regards his position, to become a passenger.²⁵

And relative to manner, it has been held that a person does not present himself to the railroad in such a way as to become a passenger who enters upon the premises of the cor-

²¹ 161 Mass. 298 (1894).

²² *Inness v. Boston, etc. Railroad*, 168 Mass. 433 (1897).

²³ See *Webster v. Fitchburg Railroad*, 161 Mass. 298 (1894).

The person must come to the station a reasonable time before the departure of the train by which he is to travel, to satisfy the condition relative to time. *Harris v. Stevens*, 31 Vt. 79.

²⁴ *June v. Boston & Albany Railroad*, 153 Mass. 79 (1891).

²⁵ *Inness v. Boston, etc. Railroad*, 168 Mass. 433 (1897).

poration running rapidly in order to catch his train, and giving so little heed to his own safety that he is struck and killed by another train.²⁶ So also a person who jumps upon a train after it has started does not offer himself to the railroad in a proper manner, and does not, consequently, become a passenger, at least until he has passed the danger of getting aboard the car and has put himself in the proper place for the carriage of passengers.²⁷

As applied to street railways, the term "passenger" has a somewhat more limited meaning. This arises from the fact that a street railway company does not maintain passenger stations. The public streets, although necessarily used by the traveller as a place from which to take, and upon which to leave, street cars, do not constitute a part of the company's premises, over which it has control and for the safety of which it can be held responsible: they are not passenger stations. The relation of passenger and carrier does not arise, therefore, until the traveller is in the act of getting upon a car which has stopped for the purpose of permitting him so to do,²⁸ and continues only so long as he is actually upon the car.²⁹

§ 155. The Payment of Fare. Gratuitous Passengers.— If a person in other respects comes within the definition of a passenger, it is not material whether he was, when killed, travelling gratuitously or had paid for his passage: the statute makes no distinction between gratuitous and paying passengers.³⁰ And, further, if he is a paying traveller, it is not material whether the payment for his passage has been made in the form of money, or in some other form. Therefore the fact alone that a person pays for his ticket, in whole or in part, by services rendered to the defendant corporation does not prevent him from acquiring the rights of a passenger

²⁶ Webster *v.* Fitchburg Railroad, 161 Mass. 298 (1894). Compare Young *v.* New York, etc. Railroad, 171 Mass. 33 (1898).

²⁷ Merrill *v.* Eastern Railroad, 139 Mass. 238 (1885).

²⁸ Gordon *v.* West End Street Railway, 175 Mass. 181, 183 (1900).

²⁹ Creamer *v.* West End Street Railway, 156 Mass. 320 (1892).

³⁰ Littlejohn *v.* Fitchburg Railroad, 148 Mass. 478, 484 (1889).

under this statute.³¹ Thus, where the deceased, under an agreement with the defendant corporation, paid in part for his transportation over its road by supplying the passengers with ice water, it was held that his relation to the defendant was nevertheless that of a passenger.³²

While an attempt to evade the payment of fare would doubtless defeat a person's claim to the rights of a passenger under this statute, yet if, after having become a passenger, he leaves the train at a station without having surrendered his ticket or paid his fare, provided he has had no opportunity to do either, that fact will not affect his status as passenger, but he will continue to have the rights which that status gives to him so long as he is rightfully on the premises of the railroad.³³

§ 156. The Termination of the Relation by the Act of the Traveller. — After the relation of carrier and passenger has become fully established between the railroad and the traveller, the latter may at any time terminate it by his own act, and so debar himself from the rights which that relation gives to him under this statute. Hence the rule has become established that if he voluntarily leaves "the train at a place and time when and where the corporation could not anticipate that he would leave it, and when and where the corporation was under no obligation to see that he had an opportunity to leave its roadway in safety after leaving the train," he ceases to be a passenger. This rule is founded upon the law of negligence. A railroad corporation owes to its passengers no duty to protect them against the consequences of their own negligent acts; such acts therefore operate as a severance of the relation. Thus a person ceases to be a passenger by leaving the train while it is in motion, even though it is moving very slowly and is about to stop at the station where he was to get off; and the fact that the car in which he was riding had passed the platform of the depot does not alter this result.³⁴

³¹ *Comm. v. Vermont & Massachusetts Railroad*, 108 Mass. 7 (1871); *Doyle v. Fitchburg Railroad*, 162 Mass. 66, 70 (1894).

³² *Comm. v. Vermont & Massachusetts Railroad*, 108 Mass. 7 (1871).

³³ *McKimble v. Boston & Maine Railroad*, 139 Mass. 542, 549 (1885).

³⁴ *Comm. v. Boston & Maine Railroad*, 129 Mass. 500 (1880).

And so, where a person left the train a short distance from the station to which he was going, at a spot where it had stopped to await the passing of another train, the station not having been called nor any invitation to alight having been given, it was held that he had by so doing severed his relation as passenger with the defendant railroad.³⁵ But the relation is not terminated, it has been held, by getting off from the train, after it has stopped at the station, on the wrong side of the car, if, by reason of the negligence of the defendant railroad, there was no gate to prevent the traveller from so doing and no warning of the danger involved in such an act was given.³⁶

§ 157. The Termination of the Relation by the Act of the Carrier.— Since common carriers are bound to transport only persons who pay their fare and who are in a proper condition, a right on the part of a railroad corporation or a street railway company to terminate the relation of passenger and carrier after it has become established, may grow out of the conduct or condition of the passenger. Thus, if he refuses to pay his fare, or if he is in such a state of intoxication as to make his presence obnoxious or dangerous to other passengers, the carrier may eject him from its cars and from its premises. And if it avails itself of this right where it exists, the relation of passenger and carrier ceases upon the ejection, even if such ejection was effected in a wrong manner, and all right of action under this statute which is based upon that relation thereupon comes to an end.³⁷

§ 158. The Termination of the Relation in the Usual Course of Events.— Unless the passenger terminates his relation with the carrier by some act of his own, or unless it is terminated by the act of the carrier, it continues not only while he is actually in transit, but also while he is rightfully leaving the train or car and the station as well, if the carrier maintains a station.³⁸

³⁵ *Buckley v. Old Colony Railroad*, 161 Mass. 26 (1894).

³⁶ *McKimble v. Boston & Maine Railroad*, 141 Mass. 463, 471 (1886).

³⁷ *Hudson v. Lynn & Boston Railroad*, 178 Mass. 64, 66 (1901); *s. c.* 185 Mass. 510 (1904).

³⁸ *McKimble v. Boston & Maine Railroad*, 139 Mass. 542 (1885).

In the case of a railroad, when the traveller is once off from the station premises of the corporation upon the public street, and is moving along that street across the tracks of the corporation toward some other place than its station, he has ceased to be a passenger within the meaning of this statute.³⁹

In the case of a street railway the relation terminates the moment the traveller steps from the platform of the car on to the public highway. "When a passenger steps from the car upon the street, he becomes a traveller upon the highway, and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk." Thus, where a person had touched the ground on leaving the car, and was in the act of taking his second step when he was struck and instantly killed by a car approaching from the opposite direction, it was held that he had ceased to be a passenger and was simply a traveller upon the highway at the time when the accident happened, and hence no action under this statute for his death could be maintained.⁴⁰

§ 159. The Question of the Due Care of a Passenger.— This statute does not in terms exact due care from a passenger, although expressly requiring it of the other persons for whose death it gives a right of action. From this fact, which appears in all prior legislation upon this subject, the court was led to decide that the legislature intended to subject railroad corporations⁴¹ and street railway companies⁴² to the penalty for causing the death of a passenger without regard to the question whether or not he was at the time of the accident in the exercise of due care. It follows, of course, that if the deceased was when killed a passenger, it is not a part of the plaintiff's case to prove that he was in the exercise of due care at the time;⁴³ and, further, that any want of due care

³⁹ *Allerton v. Boston & Maine Railroad*, 146 Mass. 241 (1888).

⁴⁰ *Creamer v. West End Street Railway*, 156 Mass. 320 (1892).

⁴¹ *Comm. v. Boston & Lowell Railroad*, 134 Mass. 211 (1883).

⁴² See *Creamer v. West End Street Railway*, 156 Mass. 320 (1892).

⁴³ *McKimble v. Boston & Maine Railroad*, 139 Mass. 542, 549 (1885).

on his part is not a defence, either to an indictment⁴¹ or to an action of tort.⁴²

"OR OF A PERSON WHO IS IN THE EXERCISE OF DUE CARE AND WHO IS NOT A PASSENGER OR IN THE EMPLOY OF SUCH CORPORATION,"

§ 160. The Question of the Due Care of a Person not a Passenger. — Under this provision of the statute, the burden rests upon the plaintiff to show, either by positive affirmative testimony or by evidence from which the inference may legitimately be drawn, that the deceased was at the time of the accident in the exercise of due care.⁴³ When no testimony of positive acts of care on his part at that time is available, it is competent for the plaintiff to put in evidence all the facts and circumstances of the case; if this disclosure of facts is sufficiently full, the absence of fault on the part of the deceased may, it has been held, be enough to warrant an infer-

"Merrill v. Eastern Railroad, 139 Mass. 252 (1885).

"Comm. v. Boston & Lowell Railroad, 126 Mass. 61, 69 (1878); Maguire v. Fitchburg Railroad, 146 Mass. 379 (1888); Mullen v. Springfield Street Railway, 164 Mass. 450 (1895); Galbraith v. West End Street Railway, 165 Mass. 572, 580 (1896); Emery v. Boston & Maine Railroad, 173 Mass. 136 (1899); Mathes v. Lowell, etc. Street Railway, 177 Mass. 416 (1901); Gleason v. Worcester Consolidated Street Railway, 184 Mass. 290 (1903).

For additional cases where the question of due care on the part of the deceased is discussed, see Tyler v. Old Colony Railroad, 157 Mass. 336, 339 (1892); Hubbard v. Boston & Albany Railroad, 162 Mass. 132 (1894); Brady v. Old Colony Railroad, 162 Mass. 408 (1894); Wallace v. New York, etc. Railroad, 165 Mass. 236 (1896); Clark v. Boston & Maine Railroad, 164 Mass. 434, 439 (1895); Murray v. Fitchburg Railroad, 165 Mass. 448 (1896); Tilton v. Boston & Albany Railroad, 169 Mass. 253 (1897); Tumalty v. New York, etc. Railroad, 170 Mass. 164 (1898); Phelps v. New England Railroad, 172 Mass. 98 (1898).

"When the whole evidence has no tendency to show care on the part of the traveller, but on the contrary shows that he was careless, it is the duty of the court to direct a verdict for the defendant." Mathes v. Lowell, etc. Street Railway, 177 Mass. 416, 420 (1901).

In Raymond v. New York, New Haven & Hartford Railroad, 182 Mass. 337 (1902), it was held that a person who crossed a railroad at a grade crossing without looking to see whether a train was approaching was negligent, and that there could be no recovery under this statute for her death.

ence of due care.⁴⁶ If, however, the deceased was killed under such circumstances that it cannot be shown what he was doing at the time of the accident, and it does not appear that there was any neglect on the part of the railroad which might have misled him, a jury will not be warranted in presuming that he was in the exercise of due care.⁴⁷

Under this statute, as at common law, not the same degree of care is exacted from an infant as from a person of full age, but only that degree which a prudent child of his age ought to exercise.⁴⁸

§ 161. "Or in the Employ of such Corporation." — These words are not interpreted in a popular sense; they are, rather, given a more limited meaning. Therefore those cases are held not to come within their meaning, where the carrier has, at the time of the accident, no control over the actions or time of the deceased, although he may be in its service

"*Maguire v. Fitchburg Railroad*, 146 Mass. 379 (1888). It appears from this case that a disclosure of facts which shows what the deceased was doing at the time of the accident — that he was engaged in the performance of his duty in the usual manner — is sufficient to warrant the inference of due care.

"If from the evidence the inference that he exercised ordinary care can be only conjectural the question ought not to be submitted to the jury." *Gleason v. Worcester Consolidated Street Railway*, 184 Mass. 290 (1903).

"*Livermore v. Fitchburg Railroad*, 163 Mass. 132 (1895).

Where shortly before the accident the deceased was in such a stupor, due to intoxication, that he could not be awakened either by shaking or kicking, it was held that a person in such a condition could not have been found to have been in the exercise of due care. *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510, 519 (1904).

"*Butler v. New York, New Haven & Hartford Railroad*, 177 Mass. 191 (1900). In this case, as bearing upon the due care of the mother of the deceased, it appeared that she was a poor woman and alone in the house; that she left the deceased on the front steps with other children for about five minutes, while she went to her washing. Held that "while it may not be a sufficient reason for making greater requirements of a defendant that the plaintiff was disabled by poverty from taking certain precautions, the circumstances and limited powers of a large part of the community may be taken into account in determining what persons who use or cross the highways must look out for, and what they shall be held entitled to expect from those whom they meet and may injure. The poor cannot always keep their children in the house or always see that they are attended when out of doors." Chief Justice Holmes, at page 193.

in some capacity during certain other hours of the day. Thus it has been held that a person who was in the service of the railroad as clerk, and who travelled back and forth over its road to and from his work on an employee's ticket which was given to him as a part of the compensation for his services, and on which he had a right to ride after business hours for his own private purposes, was not in the employment of the railroad within the meaning of this provision while riding on this ticket upon his own personal business, after his hours of service were over.⁴⁹

"IT SHALL BE PUNISHED BY A FINE OF NOT LESS THAN FIVE HUNDRED NOR MORE THAN FIVE THOUSAND DOLLARS WHICH SHALL BE RECOVERED BY AN INDICTMENT PROSECUTED WITHIN ONE YEAR AFTER THE TIME OF THE INJURY WHICH CAUSED THE DEATH,"

§ 162. The Measure of the Amount of the Fine.— Since this statute is penal in its nature, having for its primary object the punishment of the railroad corporation or the street railway company which has caused the death of such a person as is therein described, the amount of the damage suffered in consequence of that death obviously can afford no true criterion by which the penalty to be paid can be determined. As in all cases of a penal nature, the true inquiry here is as to the degree of culpability of the corporation, or of the agents or servants for whose acts it is responsible. Between the limits named in this provision, that consideration alone furnishes the measure of the fine to be imposed.⁵⁰

"AND SHALL BE PAID TO THE EXECUTOR OR ADMINISTRATOR,"

§ 163. The Appointment of an Executor or Administrator.— It is necessary to allege in the pleadings under this statute that administration upon the estate of the deceased has been taken out in this Commonwealth.⁵¹ It is sufficient to satisfy this requirement, however, if that fact can reasonably

⁴⁹ Doyle *v.* Fitchburg Railroad, 162 Mass. 66 (1894).

⁵⁰ See Hudson *v.* Lynn & Boston Railroad, 185 Mass. 510, 513 (1904).

⁵¹ Comm. *v.* Sanford, 12 Gray, 174 (1858).

be inferred from all the allegations of the pleadings upon the point. Thus, where it was alleged that the deceased, one Burns, had resided and lost his life in Boston, and that A, of Boston, "has been duly appointed and now is administrator of said Burns," it was held that the reasonable implication was that the appointment was made in this State, and that the indictment was in this respect sufficient.⁵²

The validity of the appointment of an executor or an administrator by a probate court having jurisdiction cannot be questioned by the carrier in a suit against it by such executor or administrator under this statute.⁵³

"ONE-HALF THEREOF TO THE USE OF THE WIDOW AND ONE-HALF TO THE USE OF THE CHILDREN OF THE DECEASED; OR, IF THERE ARE NO CHILDREN, THE WHOLE TO THE USE OF THE WIDOW; OR, IF THERE IS NO WIDOW, THE WHOLE TO THE USE OF THE NEXT OF KIN;"

§ 164. A Beneficiary must exist. — Though essentially and primarily penal in nature, the secondary object of proceedings under this statute is to secure some pecuniary provision for those who were dependent upon the deceased. It is indispensable, therefore, that some of those persons who are entitled to the benefit of the fine which may be imposed should appear to exist. Hence it has been held that the indictment should allege as a distinct affirmative averment that the deceased has left a widow and child, or one of them, as the case may be, or, if there is neither widow nor child, then next of kin, for whose benefit the executor or administrator is acting.⁵⁴ It is not necessary, however, to state in the indictment the names of the parties to be benefited by the fine imposed; it is enough if the name of the executor or

⁵² Comm. *v.* East Boston Ferry Company, 13 Allen, 589 (1866).

⁵³ McCooey *v.* New York, New Haven & Hartford Railroad, 182 Mass. 205 (1902).

⁵⁴ Comm. *v.* Eastern Railroad Company, 5 Gray, 473 (1855); Comm. *v.* Boston & Albany Railroad, 121 Mass. 36 (1876).

An averment that the railroad is liable to the fine "to the use of A, who has been duly appointed administrator of the said deceased, and the heirs-at-law of said deceased," has been held, therefore, not to be sufficient. Comm. *v.* Eastern Railroad Company, 5 Gray, 473 (1855).

administrator is set out and the averment made that the deceased has left persons entitled to the benefit.⁵⁵

"BUT A CORPORATION WHICH OPERATES A RAILROAD SHALL NOT BE SO LIABLE FOR THE DEATH OF A PERSON WHILE WALKING OR BEING UPON ITS ROAD CONTRARY TO LAW OR TO THE REASONABLE RULES AND REGULATIONS OF THE CORPORATION."

§ 165. **The Rights of Trespassers.**—This statute has not altered the common law principles as to trespassers. Under its provisions, therefore, the rule is established that if the deceased was trespassing upon the tracks of the corporation at the time of the accident which resulted in his death, there can be no recovery, unless it appears that the corporation was guilty of reckless and wilful misconduct toward him.⁵⁶ And in order to make the rule applicable it is not necessary to show that the deceased was actually trespassing upon the roadbed itself; it applies as well where he was when killed trespassing anywhere within the location of the railroad.⁵⁷ It seems, furthermore, that this same rule applies with equal force and effect where the deceased was upon the premises of the railroad as a mere licensee.⁵⁸

While the particular exemption created by this provision applies only to railroads, it does not cover all the law upon the subject. It has been held accordingly that a street railway company is not liable for causing the death of a person who was, at the time of the accident trespassing upon its cars, in the absence of wanton or reckless conduct on its part.⁵⁹

⁵⁵ *Comm. v. Boston & Worcester Railroad*, 11 *Cush.* 512 (1853).

⁵⁶ *McCreary v. Boston & Maine Railroad*, 153 *Mass.* 300 (1891); *s. c.* 156 *Mass.* 316 (1892).

A person who is killed at a railroad crossing over a way which has not been established either by due legal proceedings or by prescription is a trespasser within the meaning of this rule. *McCreary v. Boston & Maine Railroad*, 153 *Mass.* 300 (1891).

⁵⁷ *Dillon v. Connecticut River Railroad*, 154 *Mass.* 478 (1891).

⁵⁸ *Sullivan v. Boston & Albany Railroad*, 156 *Mass.* 378 (1892).

It need not be alleged in the indictment that the deceased was not at the time of the accident walking or being upon the defendant's road contrary to law, and the reasonable regulations of the corporation. *Comm. v. Fitchburg Railroad*, 10 *Allen*, 189 (1865).

⁵⁹ *Gay v. Essex Electric Street Railway*, 159 *Mass.* 242 (1893).

"SUCH CORPORATION SHALL ALSO BE LIABLE IN DAMAGES . . . WHICH SHALL BE ASSESSED WITH REFERENCE TO THE DEGREE OF CULPABILITY OF THE CORPORATION OR OF ITS SERVANTS OR AGENTS,"

§ 166. **The Existence of Negligence Essential.** — The amount of the damages that may be recovered in proceedings under this statute is to be determined, as already indicated,⁶⁰ not according to the loss sustained by the widow, or children, or next of kin of the deceased, but according to the degree of blame that attaches to the railroad. It is essential, therefore, that some degree of negligence on its part, or on the part of its servants or agents, should appear in order that an action of tort or an indictment may be sustained. As was said by Mr. Justice Holmes in *Littlejohn v. Fitchburg Railroad*,⁶¹ in reference to this provision: "This language imports that there must be some degree of culpability on the part of the corporation or of its servants, and is not satisfied by showing that the corporation assumed a contractual or quasi-contractual responsibility for third persons who were not its servants." It seems, consequently, that if a person is killed by reason of a defect in some matter in construction which was the work of private parties, which defect was not known to the carrier and could not have been discovered by the exercise of any degree of care, there can be no recovery under this statute, since in such case there is no degree of culpability on the part of the carrier or its servants. But if the carrier knows, or ought to have known, that a place in its roadbed was in a dangerous condition, carrying passengers into that place under those circumstances is such negligence as will satisfy the requirements of this statute, although the carrier did not create the dangerous condition, and had not the right to remedy it.⁶²

⁶⁰ See § 162, *ante*.

⁶¹ 148 Mass. 478, 482 (1889).

⁶² *Littlejohn v. Fitchburg Railroad*, 148 Mass. 478 (1889).

In *Leary v. Fitchburg Railroad*, 173 Mass. 373 (1899), it appeared that the deceased, a passenger, was found under the wheels on the wrong side of the train upon which he had been riding, after it had stopped near the station and started again. There was no evidence to show how he

"IF AN EMPLOYEE OF A RAILROAD CORPORATION, BEING IN THE EXERCISE OF DUE CARE, IS KILLED UNDER SUCH CIRCUMSTANCES AS WOULD HAVE ENTITLED HIM TO MAINTAIN AN ACTION FOR DAMAGES AGAINST SUCH CORPORATION IF DEATH HAD NOT RESULTED, THE CORPORATION SHALL BE LIABLE IN THE SAME MANNER AND TO THE SAME EXTENT AS IT WOULD HAVE BEEN IF THE DECEASED HAD NOT BEEN AN EMPLOYEE."

§ 167. **The Extent of the Right given by this Provision.**—The scope of the right of action here created in favor of the employees of railroad corporations is limited. It alters the rules of the common law which are applicable to cases of this class only so far as to give to the executor or administrator of the deceased employee the right to maintain an action against the corporation for causing his death, if the employee himself, had he survived, could have maintained an action on the same facts—and not otherwise. It follows, therefore, that the doctrine of common employment affords a perfect defence to an action based upon this provision; and the Employers' Liability Act⁶³ cannot be invoked to avoid such defence.⁶⁴

Likewise, the common law rule that an employee "assumes the obvious risks arising from the nature of the employment, from the manner in which the business is carried on, and from the condition of the ways, works, and machinery, if he is of sufficient capacity to understand and appreciate them," applies to cases under this provision with the same force and effect as at common law.⁶⁵

came there. The judge directed a verdict for the defendant. The court sustained this direction, holding that to attribute his death to the defendant would be founding a verdict upon a guess.

⁶³ Rev. Laws, ch. 106, §§ 71-79.

⁶⁴ *Dacey v. Old Colony Railroad*, 153 Mass. 112, 117 (1891); *Clark v. New York, etc. Railroad*, 160 Mass. 39 (1893). And see *Peaslee v. Fitchburg Railroad*, 152 Mass. 155 (1890).

⁶⁵ *Goodes v. Boston & Albany Railroad*, 162 Mass. 287 (1894).

For suggestions as to form of indictment under this section, see *Comm. v. Boston & Worcester Railroad Company*, 11 Cush. 512 (1853); *Comm. v. Fitchburg Railroad*, 120 Mass. 372 (1876); *Comm. v. Boston & Maine Railroad*, 133 Mass. 383 (1882); and see *Fulter v. Boston & Albany Railroad*, 133 Mass. 491 (1882).

The recovery of a judgment for the conscious suffering in an action

PART II.

THE LIABILITY OF RAILROADS FOR CAUSING INJURY OR DEATH AT GRADE CROSSINGS.

REVISED LAWS, CHAPTER 111, SECTION 268. If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing such as is described in section one hundred and eighty-eight¹ and it appears that the corporation neglected to give the signals required by said section, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment as provided in the preceding section, or, if the life of a person so injured is lost, to damages recoverable in an action of tort, as provided in said section, unless it is shown that, in addition to a mere want of ordinary care, the person injured or the person who had charge of his person or property was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury.

§ 168. The Distinction between Proceedings under this Section and under Section 267.—The scope of this section is broader than the scope of that portion of section two hundred and sixty-seven which covers much the same ground, in two directions. Proceedings under this section are not confined, as they are under section two hundred and sixty-seven, to accidents resulting in death; but they may be employed also

based upon the Employers' Liability Act will not bar an action for the death based upon this statute. *Clare v. New York & New England Railroad*, 172 Mass. 211 (1898).

¹ Rev. Laws, ch. 111, § 188. Every railroad corporation shall cause a bell of at least thirty-five pounds in weight, and a steam whistle, to be placed on each locomotive engine passing upon its road; and such bell shall be rung or at least three separate and distinct blasts of such whistle sounded at the distance of at least eighty rods from the place where the road crosses upon the same level any highway, town way or travelled place over which a sign board is required to be maintained as provided in sections one hundred and ninety and one hundred and ninety-one; and such bell shall be rung or such whistle sounded continuously or alternately until the engine has crossed such way or travelled place. The provisions of this section shall not affect the authority conferred upon the board by the provisions of the following section.

where injury to the person alone, and as well where damage to property alone, results from the collision.²

Under section two hundred and sixty-seven proceedings may be supported by proof of any facts, properly alleged, which show that the collision at the crossing was due to negligence on the part of the corporation or to gross negligence on the part of its servants or agents, even though the bell was rung and the whistle sounded continuously for eighty rods before the crossing was reached,³ and if an omission to ring the bell or to sound the whistle are the facts relied on to fix the liability, such omission is treated simply as evidence of negligence.⁴ But, on the other hand, a person can maintain his proceedings under this section only by averring and proving the omission to ring the bell and to sound the whistle as provided in section one hundred and eighty-eight of the statute; and such omission, when established, fixes the liability of the railroad irrespective of the question of negligence.⁵

And again, with reference to the question of due care, a distinction between the two sections may be noted. Under section two hundred and sixty-seven the burden rests upon the plaintiff to show that the deceased was in the exercise of due care at the time of the collision;⁶ under this section due care is not an element in the plaintiff's case, and therefore no mere want of ordinary care on his part at that time will defeat a recovery.⁷

² "It may be open to question whether the remedy by indictment extends to cases of collision not attended by loss of life." Dictum by Mr. Justice C. Allen in *Comm. v. Boston & Maine Railroad*, 133 Mass. 383 (1882). In an action under section 268 for causing death, the plaintiff cannot recover damages for conscious suffering. *Lamoureux v. New York, etc. Railroad*, 169 Mass. 338, point 4 (1897).

³ The statutory signals are not necessarily a sufficient precaution. *Bradley v. Boston & Maine Railroad*, 2 *Cush.* 539, 543 (1848).

⁴ See § 151, *ante*.

⁵ See *Comm. v. Boston & Maine Railroad*, 133 Mass. 383, 388 (1882), also § 171, *post*. But see *Comm. v. Fitchburg Railroad*, 120 Mass. 372 (1876).

⁶ *Livermore v. Fitchburg Railroad*, 163 Mass. 132 (1895).

⁷ *Sullivan v. New York, etc. Railroad*, 154 Mass. 524, 527 (1891); *Walsh v. Boston & Maine Railroad*, 171 Mass. 52 (1898).

For actions at common law where the plaintiff was injured by reason of a failure of the railroad to give the statutory signals, there being,

§ 169. What a Plaintiff must allege in his Pleadings. — In order to maintain proceedings under this statute, the plaintiff must, of course, set out in his pleadings all the circumstances required by the statute to fix the liability, — he must aver that the collision by which he was injured occurred at a crossing of a highway at grade; that the railroad neglected to give the signals required by the statute at such crossings, and that such neglect contributed to the injury.⁸

"IF A PERSON IS INJURED IN HIS PERSON OR PROPERTY BY COLLISION WITH THE ENGINES OR CARS OF A RAILROAD CORPORATION AT A CROSSING SUCH AS IS DESCRIBED IN SECTION ONE HUNDRED AND EIGHTY-EIGHT"

§ 170. The Liability limited to Crossings over Public Ways. — The liability created by this statute, by reason of this provision, is limited in its application to collisions that occur at crossings at grade over ways open to public use. Therefore an accident happening at a private crossing made for and used by the employees of the railroad, does not, it seems, come within its terms.⁹

The burden rests upon the plaintiff, consequently, to establish the fact that the crossing where the collision happened was a crossing at grade over a highway, established by due legal proceedings, by prescription,¹⁰ or otherwise; or over a town way¹¹ or "travelled place." In order to bring his case

however, no actual collision in consequence of the omission, see *Norton v. Eastern Railroad Company*, 113 Mass. 366 (1873); *Prescott v. Same*, 113 Mass. 370, n. (1873); *Pollock v. Same*, 124 Mass. 158 (1878).

* *Wright v. Boston & Maine Railroad*, 129 Mass. 440, 443 (1880); *Allerton v. Same*, 146 Mass. 241, 247 (1888).

* *June v. Boston & Albany Railroad*, 153 Mass. 79, 82 (1891).

¹⁰ For cases where the highway was established by prescription, see *Johanson v. Boston & Maine Railroad*, 153 Mass. 57 (1891); *Bagley v. New York, etc. Railroad*, 165 Mass. 160 (1896). For cases where the evidence was held not sufficient to establish a highway by prescription, see *McCreary v. Boston & Maine Railroad*, 153 Mass. 300 (1891); *Sprow v. Boston & Albany Railroad*, 163 Mass. 330 (1895).

In 1892 an act was passed to prevent the acquisition of rights of way across railroads by prescription. Rev. Laws, ch. 111, § 148. This does not affect existing rights.

¹¹ For a case not within the section by reason of the discontinuance of the town way, see *Coakley v. Boston & Maine Railroad*, 159 Mass. 32

within this latter phrase, the plaintiff is not required to show that the way had been so laid out and established as to render the town liable for injuries resulting from defects therein; but only that it was an open and travelled way over which a sign-board had been, or ought to have been, erected.¹²

“AND IT APPEARS THAT THE CORPORATION NEGLECTED TO GIVE THE SIGNALS REQUIRED BY SAID SECTION,”

§ 171. The Omission of the Prescribed Signals. — One purpose of this statute, doubtless its chief purpose, is to enforce the performance by railroad corporations of the duty, which is imposed by an earlier section,¹³ of ringing the bell or sounding the whistle at crossings of public ways at grade, in the manner and at the distance prescribed. Its enactment has, therefore, served to emphasize that duty and has made it an absolute obligation, entirely independent of the question of negligence. If, consequently, from any cause whatever, whether through negligence or otherwise, there is a failure to give, in the manner and at the distance specified, the required warnings on approaching a grade crossing, such failure fixes the liability of the corporation under this statute, provided it can be shown to have contributed to the injury. The corporation must, then, at its peril, see that the required signals are given.¹⁴

(1893). For a case where the crossing at which the accident happened was held not to be such as is described in section one hundred and eighty-eight of the statute, see *Stewart v. New York, etc. Railroad*, 170 Mass. 430 (1898).

¹² *Whittaker v. Boston & Maine Railroad*, 7 Gray, 98 (1856).

A way is not a “travelled place” within the meaning of section one hundred and eighty-eight, “unless the railroad corporation had been requested in writing by the selectmen, or required by the County Commissioners, to erect and maintain boards at the crossing.” *Coakley v. Boston & Maine Railroad*, 159 Mass. 32, 38 (1893).

The provisions of this section apply also to accidents happening at a crossing established by estoppel. *Hanks v. Boston & Albany Railroad*, 147 Mass. 495 (1888).

¹³ Section one hundred and eighty-eight.

¹⁴ *Comm. v. Boston & Maine Railroad*, 133 Mass. 383, 388 (1882); *Bayley v. Eastern Railroad*, 125 Mass. 62 (1878); *Livermore v. Fitchburg Railroad*, 163 Mass. 132 (1895); *Marden v. Boston & Albany Railroad*, 159 Mass. 393 (1893).

§ 172. **The Evidence of the Omission of the Prescribed Signals.** — The burden of establishing the fact that the bell was not rung nor the whistle sounded at the distance¹⁵ and in the manner prescribed in the statute rests upon the plaintiff. Usually it is a burden that he can sustain only by the testimony of witnesses who can simply swear that they did not hear the bell or the whistle. Such testimony, standing by itself, has naturally but little weight. It must derive its value largely from the surrounding circumstances, such as the situation and occupation of the witnesses at the time. Upon this point Mr. Justice Knowlton, in *Menard v. Boston & Maine Railroad*,¹⁶ has said: "Ordinarily, all that a witness can say, in such a case, when called to prove that a bell was not rung, is that he did not hear it. Such a statement, with no accompanying facts, is merely negative, and of no value as evidence. But attending circumstances may be shown which make the statement strong affirmative evidence. It may appear that all the attention of which the witness was capable was concentrated on the effort to ascertain whether the bell was rung, and his failure to hear it could only have been because it made no sound. A witness may be in any conceivable attitude of attention or inattention, which will give his evidence value, or leave it with little or no weight."¹⁷

And upon this issue evidence of a habit of giving, or of omitting, the signals is not competent. Thus the plaintiff cannot put in evidence the fact that the railroad often or usually omitted to give the required warnings at the crossing in question, and to ask the jury to infer therefrom that they were not given at the time of the accident. Likewise, it is not permissible for the railroad to show that its servants usually rang the bell and sounded the whistle at that par-

¹⁵ "At least eighty rods from the place where the road crosses upon the same level any highway, town way or travelled place." Rev. Laws, ch. 111, § 188.

¹⁶ 150 Mass. 386 (1890).

¹⁷ *Hubbard v. Boston & Albany Railroad*, 159 Mass. 320 (1893); *Lamoureux v. New York, etc. Railroad*, 169 Mass. 338, point 1 (1897); *Walsh v. Boston & Maine Railroad*, 171 Mass. 52 (1898), accord.

ticular crossing, and to ask the jury to conclude therefrom that those things were done at the time of the accident.¹⁸

The question whether or not there was an omission to give the prescribed signals is thus usually a question of fact to be decided by the jury.¹⁹

"AND THAT SUCH NEGLECT CONTRIBUTED TO THE INJURY,"

§ 173. **The Proof that the Omission of the Signals contributed to the Injury.**— It is a necessary part of the plaintiff's case that he should both allege and prove that the failure of the railroad to give the required signals contributed to the injury. He is not obliged, however, to establish this connection by means of direct evidence only; indeed, to do so becomes impossible in those cases where the accident results in instant death, since the only strictly direct testimony upon the point would have to come from the person killed. In the absence of such direct evidence, the connection may properly be inferred from the attending facts and circumstances. Thus, where the deceased was instantly killed by the collision, it was held that the fact that the omission of the signals contributed to the accident might properly be inferred from evidence tending to show that the deceased was awake and capable of hearing the warnings, if they had been given; that he knew the location of the crossing where the collision occurred; and that he was driving at a proper rate of speed at the time.²⁰

¹⁸ Tuttle *v.* Fitchburg Railroad, 152 Mass. 42 (1890).

For cases where the testimony of witnesses to the effect that they did not hear the required signals was held sufficient to warrant a finding that no signals were given, see Copley *v.* New Haven & Northampton Company, 136 Mass. 6 (1883); Menard *v.* Boston & Maine Railroad, 150 Mass. 386 (1890); Johanson *v.* Boston & Maine Railroad, 153 Mass. 57 (1891); In Elkins *v.* Boston & Albany Railroad, 115 Mass. 190 (1874), the jury found that the signals were not given, but the court set aside the verdict as against the weight of evidence.

¹⁹ McDonald *v.* New York Central, etc. Railroad, 186 Mass. 474, 475 (1904).

²⁰ Doyle *v.* Boston & Albany Railroad, 145 Mass. 386 (1888); Lamoureux *v.* New York, etc. Railroad, 169 Mass. 338, point 2 (1897).

Upon this subject the court said in a late case: "It is to be presumed that persons approaching a place of danger, like a railroad crossing,

"THE CORPORATION SHALL BE LIABLE FOR ALL DAMAGES CAUSED BY THE COLLISION, OR TO A FINE RECOVERABLE BY INDICTMENT AS PROVIDED IN THE PRECEDING SECTION, OR, IF THE LIFE OF A PERSON SO INJURED IS LOST, TO DAMAGES RECOVERABLE IN AN ACTION OF TORT, AS PROVIDED IN SAID SECTION,"

§ 174. The Collision must be the Proximate Cause of the Death. Suicide as an Intervening Cause.—In those cases where the loss of the life of a person results from the accident, it must appear that the collision was the proximate cause of the death. It follows that the intervention of a new and independent cause will break the line of causation and prevent a recovery under this statute.²¹

An act of self-destruction may, or may not, be such a new and independent cause. Whether or not it is turns upon the question whether the suicide, knowing the nature and effect of his act, purposely chose to take his life. "The liability of a defendant for a death by suicide exists only when the death is the result of an uncontrollable impulse, or is accomplished in delirium or frenzy caused by the collision, and without conscious volition to produce death, having knowledge of the physical nature and consequences of the act. An act of suicide resulting from a moderately intelligent power of choice, even though the choice is determined by

ordinarily will pay some attention to signals given for the purpose of warning them of approaching trains. The requirement that signals shall be given is based on this assumption. It is not an unreasonable inference, therefore, that, if there is an accident at a railroad crossing, and the bell was not rung nor the whistle blown, that fact, in the absence of evidence to the contrary, had something to do with it." *Walsh v. Boston & Maine Railroad*, 171 Mass. 52, 58 (1898). And so, in *Brusseau v. New York, New Haven & Hartford Railroad*, 187 Mass. 84, 85 (1904), it was held that "if the signals were not sounded, the jury under the circumstances might infer that the absence of them contributed to the injury."

²¹ *Daniels v. New York, New Haven & Hartford Railroad*, 183 Mass. 393 (1903). In this case the accident happened on the twelfth day of August and deceased died by his own hand on the third day of the following October. It appeared that, though he was insane at the time of the suicide, which insanity was a result of the injury, he understood the physical nature and effect of his act and had an intelligent purpose to accomplish it. It was held that the death was not the proximate result of the accident.

a disordered mind, should be deemed a new and independent, efficient cause of the death that immediately ensues.”²²

“UNLESS IT IS SHOWN THAT, IN ADDITION TO A MERE WANT OF ORDINARY CARE, THE PERSON INJURED OR THE PERSON WHO HAD CHARGE OF HIS PERSON OR PROPERTY WAS, AT THE TIME OF THE COLLISION, GUILTY OF GROSS OR WILFUL NEGLIGENCE, OR WAS ACTING IN VIOLATION OF THE LAW, AND THAT SUCH GROSS OR WILFUL NEGLIGENCE OR UNLAWFUL ACT CONTRIBUTED TO THE INJURY.”

§ 175. The Negligence or Violation of Law of the Injured Person a Matter of Defence only. The Burden of Proof.—This provision opens the way to a possible defence to actions based upon this statute. Since it affords matter in defence only, the burden of showing that the person injured was guilty of gross or wilful negligence or was acting in violation of law, and as well the burden of showing that such negligence or unlawful act contributed to the injury, rests upon the railroad.²³

When negligence on the part of the person injured is the defence relied on, this burden of proof cannot be sustained by showing merely a want of ordinary care;²⁴ by the very terms of this provision a clear distinction is drawn between ordinary negligence and gross or wilful negligence. This latter phrase as here used means something different from the former,—a something, however, that is no more capable of being defined in fixed terms than is the idea conveyed by the former. It is only possible to say that in order to avail itself of the means of escape here afforded, the railroad must

²² Chief Justice Knowlton in *Daniels v. New York, New Haven & Hartford Railroad*, 183 Mass. 393, 399 (1903). The court adds, at page 400: “That he was insane, so as to be free from moral responsibility, is not enough to make the defendant liable.”

²³ *McDonald v. New York Central, etc. Railroad*, 186 Mass. 474, 476 (1904); *Brusseau v. New York, New Haven & Hartford Railroad*, 187 Mass. 84, 85 (1904).

²⁴ See *Sullivan v. New York, etc. Railroad*, 154 Mass. 524, 527 (1891); *Copley v. New Haven & Northampton Company*, 136 Mass. 6, 10 (1883).

show something more in point of degree than a mere lack of due care.²⁵

Where the testimony in the case does not show just how the accident happened, as well as where there is a conflict of evidence upon the issue, the question whether the injured person was guilty of gross or wilful negligence is for the jury to determine.²⁶ But where the facts are clear and undisputed and the question is simply whether those facts disclose gross or wilful negligence on the part of the injured person, the court may take the case from the jury and rule upon the question as matter of law.²⁷

PART III.

THE LIABILITY OF RAILROADS AND STREET RAILWAYS FOR DAMAGES CAUSED BY FIRE.

REVISED LAWS, CHAPTER 111, SECTION 270. Every railroad corporation and street railway company shall be liable in damages to a person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, and shall have an insurable interest in the property upon its route for which it may be so held liable, and may procure insurance thereon in its own behalf. If it is held liable in damages, it shall be entitled to the benefit of any insurance effected upon such property by the owner thereof, less the cost of premium

* Debbins *v.* Old Colony Railroad, 154 Mass. 402, 404 (1891); Copley *v.* New Haven & Northampton Company, 136 Mass. 6, 10 (1883).

"Gross or wilful negligence is more than mere negligence, as these words are used in the statute; but the distinction between them is one of degree." Mr. Justice Lathrop in Emery *v.* Boston & Maine Railroad, 173 Mass. 136, 139 (1899).

* McDonald *v.* New York Central, etc. Railroad, 186 Mass. 474, 479 (1904).

* Debbins *v.* Old Colony Railroad, 154 Mass. 402 (1891); Emery *v.* Boston & Maine Railroad, 173 Mass. 136, 139 (1899). In this last case it appeared that there was a guard at the crossing in question, who was swinging his lantern at the time; that a good view of the tracks could be had; that deceased was familiar with the locality; that he was walking at a moderate rate, with shoulders slightly stooped, and stepped upon the track apparently without looking up. Held that, as matter of law, deceased was guilty of gross negligence which contributed to his injury.

and expense of recovery. The money received as insurance shall be deducted from the damages, if recovered before they are assessed; and if not so recovered, the policy of insurance shall be assigned to the corporation which is held liable in damages, and it may maintain an action thereon.

§ 176. **The Purpose of the Statute.** — The theory of the legislature in creating this liability for damage caused by fire obviously was that the conduct of the business which a railroad corporation is authorized by law to carry on, while of great advantage to itself and as well to the public in general, at the same time necessarily exposed the property along its route to extra hazard; that as between the corporation and the property owner, that one of them which derived a profit from the conduct of the business should bear the burden of that extra hazard. The chief object of the statute is, therefore, to put the owners of property situated in close proximity to a railroad upon an equal footing, as regards the risk of loss by fire, with the owners of property not so situated. And this it accomplishes by giving to the owners of property so situated indemnity against that extra hazard to which their property is necessarily exposed by reason of its situation.¹

§ 177. **The Construction of the Statute.** — Since its purpose is to secure indemnity to certain owners of property, this statute is considered to be, not penal but purely remedial in its nature. It is, therefore, like all remedial statutes, to be given a liberal interpretation, so as to secure that indemnity which it was intended to provide to all parties who might be

¹ *Hart v. Western Railroad*, 13 Met. 99, 104 (1847); *Lyman v. Boston & Worcester Railroad*, 4 Cush. 288 (1849).

The first statute upon this subject was passed in 1837. Acts, 1837, ch. 226, §§ 9, 10. This statute made railroad corporations liable for damages caused by fire from their locomotives, "unless the said corporation shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury." In 1840 this statute was repealed and a new one omitting the quoted clause enacted. Acts, 1840, ch. 85, § 1. In that form, without substantial change save that made by the addition of the provisions of the Acts of 1895, ch. 293, the statute has been continued in force by successive re-enactments. Gen. Sta. ch. 63, § 101; Acts, 1864, ch. 229, § 34; Acts, 1871, ch. 381, § 45; Acts, 1874, ch. 372, § 106; Pub. Sta. ch. 112, § 214.

injured by fire communicated by a locomotive engine.² Thus, where the railroad the locomotive engine of which caused the injury was being operated by receivers appointed by the court, it was held that they, though not specifically made liable by the terms of the statute, came within its spirit and could be held liable under its provisions for the loss sustained.³

"EVERY RAILROAD CORPORATION AND STREET RAILWAY COMPANY"

§ 178. To what Parties the Liability attaches. Lessors. Lessees. Mortgagees. Receivers. — The phrase "every railroad corporation," as used in this provision, is of broad significance. It includes, therefore, every party engaged in the operation of a railroad: whether or not such party actually owns the franchise is not material. It has accordingly been held that the liability created by this statute attached to a lessor which was operating its road through another corporation;⁴ to a lessee which was in possession under the lease and was running trains over the road managed by its own servants and drawn by its own locomotive engines;⁵ to mortgagees who, as such, had taken possession of the road and were operating it;⁶ to receivers who were in possession of the road and were engaged in operating it under the authority of the court.⁷

² *Ross v. Boston & Worcester Railroad*, 6 Allen, 87, 90 (1863); *Wall v. Platt*, 169 Mass. 398 (1897).

³ *Wall v. Platt*, 169 Mass. 398 (1897).

⁴ *Ingersoll v. Stockbridge & Pittsfield Railroad*, 8 Allen, 438 (1864).

⁵ *Davis v. Providence & Worcester Railroad*, 121 Mass. 134 (1876).

⁶ *Daniels v. Hart*, 118 Mass. 543 (1875). When a mortgage of a railroad is made with the authority of the legislature, and the mortgagees take possession under it for breach of condition, "they stand in the place of the corporation, vested with all the rights, and subject to all the liabilities, incidental to the exercise of the franchise and the operation of the road."

⁷ *Wall v. Platt*, 169 Mass. 398 (1897). In this case Mr. Justice Morton, speaking of receivers, says: "The mischief for which the statute is designed to provide a remedy is as incident to the operation of the road in their hands as in those of the corporation. And we cannot think that, by the use of the words 'railroad corporation,' the Legislature intended to exclude them from liability under the statute in question,

"SHALL BE LIABLE IN DAMAGES"

§ 179. The Nature of the Liability. Not based upon Negligence.—At common law the action to recover damages for injuries caused by fire communicated from the defendant's premises is founded upon negligence; that is the gist of the action.⁸ This statute has entirely changed that common law rule in the limited class of cases to which it applies. The liability it has created is not based upon negligence. Under its provisions it is not at all material whether or not the railroad corporation used due care and diligence in securing locomotive engines of the safest pattern as regards the emitting of sparks, and in operating them: the bare fact that a person's property has been injured by fire communicated from those locomotive engines is enough to fix the responsibility. The liability here imposed is thus absolute in its nature, making every railroad in effect an insurer of the property along its route against fire communicated by its locomotive engines.⁹

§ 180. The Entire Damage of Each Property Owner must be recovered in One Action.—Every property owner must recover in one action the entire damage suffered by him as the result of a single fire: he cannot recover in one action for the damage to one piece of property and in another action for the damage to another piece of property which was injured by the spreading of the same fire.¹⁰ This rule rests upon the fact that the act of the defendant railroad in setting the

but that the words were used in a comprehensive sense sufficiently broad to include parties holding the relation to the corporation which receivers of a railroad corporation usually do."

⁸ *Tourtellot v. Rosebrook*, 11 Met. 460 (1846).

⁹ *Wall v. Platt*, 169 Mass. 398, 405 (1897).

"The rule of liability laid down by the statute is analogous, it seems to us, to that in the case of one who brings upon his premises a dangerous and active agency and who is bound at his peril to keep it there." Mr. Justice Morton in *Bowen v. Boston & Albany Railroad*, 179 Mass. 524, 528 (1901).

¹⁰ *Trask v. Hartford & New Haven Railroad*, 2 Allen, 331 (1861); *Knowlton v. New York & New England Railroad*, 147 Mass. 606 (1888). In this last case, at page 609, the court says: "The case is not like those of continuing injuries, as by a nuisance, where every continuance may be deemed a new injury."

fire is single, although the effect of that fire may be to injure several separate pieces of property of the same owner. Thus, where a fire communicated by a locomotive engine burned over one lot of land owned by the plaintiff and then spread over intervening land and injured another lot owned by him, it was held that the recovery in one action of damages for the injury to one lot would bar a recovery in a subsequent action of damages for the injury to the other lot.¹¹ The burning over of the second lot by the spreading of the fire "gave no new cause of action, but only additional damages resulting from the original cause of action."

§ 181. The Measure of the Damages.— Since the chief purpose of this statute is to secure indemnity to the owners of property injured by fire communicated by a locomotive engine, the measure of the damages which may be recovered is not the market value of the property injured or destroyed, but the real value of that property to its owner at the time when the fire occurred.¹²

¹¹ *Knowlton v. New York & New England Railroad*, 147 Mass. 606 (1888).

In *Bassett v. Connecticut River Railroad*, 150 Mass. 178 (1889), the plaintiff sued the railroad for negligently keeping his goods in its warehouse whereby they were destroyed by fire. It appeared that he had brought a prior suit against this defendant, based upon the same facts, in which his declaration had contained a count under this statute and a count for negligently keeping the goods; that he had relied upon the count under this statute alone and had failed to recover judgment. It was held that the judgment for the defendant in that prior suit was a bar to this action, even though the plaintiff had offered no evidence of negligence under it. The fact that the plaintiff, either by his laches or misfortune, failed to prove any negligence, and chose to rest his case solely upon the liability of the defendant under this statute, is immaterial. "The question of negligence was one of the issues involved in the case. He then had his day in court to prove this issue; it might and ought to have been tried in that case. If his proof had shown negligence, he would have been entitled to judgment on that ground. Having failed to show negligence, a judgment against him is a bar to any future action for the same cause of action."

¹² *Wall v. Platt*, 169 Mass. 398, 403 (1897). In this case it was held that the injury to the buildings was to be ascertained "by taking into account the original cost, and the cost of replacing them, and making such allowance as depreciation from use, age and other like causes, and the condition in which they were, required." That the damages for the loss of the furniture and personal effects "should be assessed according

"To A PERSON OR CORPORATION"

§ 182. Who may maintain an Action under the Statute.—The rights given by this statute are incident to the ownership of the property injured or destroyed. As was said by Chief Justice Shaw in the earliest reported case upon the subject:¹³ "This indemnity, provided by law against a special risk, may be considered as a quality annexed to the estate itself, and passing with it to any and all persons who may stand in the relation of owners, however divided and distributed such ownership may be."

Hence it makes no difference that a plaintiff has derived title to the lot upon which his buildings stood from one who had conveyed to the defendant railroad for its location another part of the same parcel of land.¹⁴

§ 183. The Application of the Doctrine of Contributory Negligence.—For many years it was a mooted question whether or not the fact that the owner of the property injured by the fire had been guilty of ordinary negligence in his care of that property, would afford a defence to an action under this statute.¹⁵ It was finally decided, however, in a recent case that such negligence was not material; that in order to prevent a recovery the negligence on the part of the property owner must be gross, or such as to amount to fraud.¹⁶

to the actual worth of the articles to her for use in the condition in which they were at the time of the fire, excluding any fanciful or sentimental considerations"—to be arrived at by taking into consideration "the cost of the articles when new, the length of time they have been used, the condition they were in at the time of the fire."

¹³ *Hart v. Western Railroad*, 13 Met. 99, 105 (1847).

In *Anthony v. New York, Providence & Boston Railroad*, 162 Mass. 60 (1894), it was held that a lessee in possession of buildings under a lease which required him to rebuild in case of loss by fire, was entitled to recover full damages in a suit under this statute.

¹⁴ *Lyman v. Boston & Worcester Railroad*, 4 Cush. 288 (1849).

¹⁵ See *Ross v. Boston & Worcester Railroad*, 6 Allen, 87, 92 (1863); *Blaisdell v. Connecticut River Railroad*, 145 Mass. 132, 134 (1887); *Wall v. Platt*, 169 Mass. 398, 405 (1897); *Wild v. Boston & Maine Railroad*, 171 Mass. 245, 248 (1898).

¹⁶ *Bowen v. Boston & Albany Railroad*, 179 Mass. 524, 527 (1901).

In support of the decision in this case Mr. Justice Morton says: "In view of the danger of fire from locomotives, the Legislature, it seems to us, has imposed upon railroad corporations a liability which is almost

" WHOSE BUILDINGS OR OTHER PROPERTY "

§ 184. What Property comes within the Protection of the Statute. — This provision of the statute is considered to be sufficiently broad to include not only buildings, fences,¹⁷ growing timber,¹⁸ and like property of a fixed nature, but as well all personal property which may be injured by fire¹⁹ and which is not held under a contract otherwise fixing the liabilities of the railroad.²⁰ "That it was not intended to confine this right of indemnity to cases of injury or destruction of property of a fixed or immovable nature is clearly indicated by the language of the statute, which is sufficiently broad and comprehensive to include every species of property liable to be injured or consumed by fire communicated by a locomotive engine. Nor are we able to see anything in the policy of the statute, or the reasons on which it is founded, to lead us to the conclusion that any restriction or limitation on these very general words should be imposed by judicial construction. There is certainly no distinction in principle by which a right to an indemnity should be secured to the owner of one species of property, in case of its injury or destruction, and denied under like circumstances to the owner of a different kind of property. The claim for an indemnity is as strong, and the necessity and expediency of creating the liability are as great, whether the property injured or consumed is of a fixed and permanent nature, or of a kind to be moved or changed at the pleasure of the owner."²¹

that of insurers, — the idea being, we think, that the parties who are authorized to use so dangerous an agency, and who have the control of it and the power to adopt safeguards in regard to its use, should bear the loss that may ensue from fires that are caused by locomotives, rather than those who have nothing to do with the management and control of them, and who are in the lawful enjoyment and occupation of their property."

¹⁷ See *Trask v. Hartford & New Haven Railroad*, 16 Gray, 71 (1860).

¹⁸ See *Perley v. Eastern Railroad*, 98 Mass. 414 (1868).

¹⁹ *Ross v. Boston & Worcester Railroad*, 6 Allen, 87, 90 (1863).

²⁰ See § 185, *post*.

²¹ Chief Justice Bigelow in *Ross v. Boston & Worcester Railroad*, 6 Allen, 87, 90 (1863).

In *Ingersoll v. Stockbridge & Pittsfield Railroad*, 8 Allen, 438, 440

§ 185. **Where the Injured Property was held by the Railroad under a Contract fixing its Liability therefor.** — “The statute referred to gives protection to owners of property who have made no arrangement with the railroad corporation about it. It was not intended to prevent the making of contracts by property owners with railroad corporations, determining their respective rights and duties in relation to particular property, or to apply to cases where such contracts have been made. Nor is there any difference in this regard between express and implied contracts. If a railroad corporation and an owner of land or personal property make an arrangement about it from which the law implies a contract broad enough to cover the subject of liability for loss or injury, this contract, implied from their voluntary act, fixes their rights, and excludes the provisions of a statute intended for cases not covered by a contract.”²² Thus, where it appeared that the railroad had transported the goods in question over its road to their destination, had unloaded them from its cars, and was holding them in its freight depot for delivery, where they were destroyed by a fire communicated by its locomotive engines, it was held that since the goods were burned while in the possession of the railroad as a warehouseman, the provisions of this statute did not apply, but that the owner of the goods must seek his remedy under the implied contract under which they were held.²³

In order to determine whether or not property is subject to such an implied contract, and therefore not within the remedy provided by this statute, the test question, as to goods which have been transported over the railroad, is, says

(1864), it was held that the fact that the building which had been destroyed had stood partly or wholly upon the railroad location, if placed there with the consent of the company, did not diminish its responsibility, in case of the destruction of the building by fire communicated by its locomotive engines. “The legislature have chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause.”

* Mr. Justice Knowlton in *Bassett v. Connecticut River Railroad*, 145 Mass. 129, 130 (1887).

* *Bassett v. Connecticut River Railroad*, 145 Mass. 129 (1887).

Mr. Justice Knowlton,²⁴ "whether they had been given up to the owner so that the contract for carriage, and incidentally for storage for a reasonable time or until delivery, no longer applied to them, and, as to those which were intended for transportation, whether they had been delivered to the corporation so that the contemplated contract had taken effect."

"MAY BE INJURED BY FIRE COMMUNICATED BY ITS LOCOMOTIVE ENGINES,"

§ 186. "Communicated." The Liability not limited to Property first touched by the Fire. The Burden of Proof.—The word "communicated," as used in this provision, is given a construction sufficiently broad so as not to restrict the liability to property immediately set on fire by the sparks from the locomotive engine. But beyond indicating the very general limitation that the property injured or destroyed must be sufficiently near to the route of the railroad so as to be exposed to the danger of fire from its locomotive engines,²⁵ it has not yet been settled just how far a fire, thus originating and spreading without the intervention of other means,²⁶

²⁴ Blaisdell v. Connecticut River Railroad, 145 Mass. 132, 134 (1887). In this case it appeared that the defendant railroad had built for the use of the plaintiffs, who were large shippers, as an addition to its freight depot, a storehouse separated therefrom by a brick wall; that, at the time of the fire, the plaintiffs were paying nothing as rent for this storehouse, although they had done so at a prior time, but used it exclusively and without objection from the defendant; that the property in it at the time of the fire had been received there in the course of business "by or for transportation." It was held that the plaintiffs might recover the value of the goods destroyed, under this statute, since, as to those received by transportation, there was nothing to indicate that the contract under which the defendant carried them had not been fully performed, and, as to the goods received for transportation, there was nothing to show that they had ever been delivered to the defendant so that the parties had come into relations of contract as to them. In the course of the opinion, at page 133, the court says: "It is quite immaterial whether the relation of landlord and tenant continued to exist between the parties, or whether the plaintiffs, after receiving freight which had been transported over the defendant's railroad, left it in one of the defendant's buildings by sufferance."

²⁵ See Hart v. Western Railroad, 13 Met. 99, 104 (1847).

²⁶ In Perley v. Eastern Railroad, 98 Mass. 414 (1868), it appeared

may go and the railroad still be held responsible for the consequences under this statute. The decisions already made in reference to the question show that a railroad will be liable where the property injured or destroyed was located sixty feet from the source of the fire,²⁷ where it was located fifteen hundred and ninety feet from the source of the fire;²⁸ where it was located about one-half mile from the source of the fire.²⁹

The burden of establishing the fact that the fire which injured or destroyed his property was communicated thereto by the locomotive engine of the defendant railroad rests, of course, upon the plaintiff.³⁰

that "back-fires" had been set in an effort to stay the progress of the fire. The judge instructed the jury that "if back-fires were kindled, in the manner stated, in good faith; and were judicious, though ineffectual, means, under the circumstances, of staying the progress of the fire, and such back-fires, while burning, were swallowed up in the wave of advancing flame, which went on thence and destroyed the plaintiff's property, it could in no way affect his right to recover." This instruction was held to be correct, since it required the jury to find, in substance, that these fires did not in fact contribute to the loss of the plaintiff.

²⁷ Hart *v.* Western Railroad, 13 Met. 99 (1847).

²⁸ Safford *v.* Boston & Maine Railroad, 103 Mass. 583 (1870).

²⁹ Perley *v.* Eastern Railroad, 98 Mass. 414 (1868).

³⁰ Ross *v.* Boston & Worcester Railroad, 6 Allen, 87, 92 (1863).

In Wild *v.* Boston & Maine Railroad, 171 Mass. 245 (1898), the evidence tended to show that fire was discovered in the plaintiff's building a short time after one of the defendant's locomotives had passed, and was first seen in some hay which was under, or nearly under, a broken window that was on the side of the building next to the track; that the wind was blowing toward the building, and the weather was misty and sleet; that when the locomotive passed the building it was throwing smoke and sparks; that there was no fire in the building. It was held that "there was evidence which warranted a finding by the jury that the fire was communicated by the locomotive."

Where it appeared that the plaintiff's building, a frame dwelling-house with a shingled roof, was located about eleven or twelve yards from the track and on a lower level, so that the roof was nearly on a level with the track; that it was empty at the time and had no fire in it; that fire was first seen on the roof over the door or near the door; that the track by the building was on an up grade which required greater exertion of the engines; that trains passed frequently and had emitted sparks which had caused fires; that a train had passed on the night of the fire, some time before it was discovered; that the weather was dry; it was held that in view of this evidence, the court could not say "that

§ 187. The Evidence Competent upon the Issue of the Communication of the Fire by Locomotive Engines. — In support of the issue whether or not the fire which injured or destroyed the plaintiff's property was communicated thereto by the locomotive engines of the defendant railroad, it is competent for the plaintiff to show, in addition to any direct and positive testimony tending to establish the fact, that on previous occasions the engines of the defendant had emitted sparks; that those sparks had at other times fallen within the plaintiff's premises; that those sparks had caused other fires; and facts of like character.³¹ Such evidence has a tendency to show "the possibility, and, in the absence of any other apparent cause, the consequent probability, that some engine caused the fire."

"AND SHALL HAVE AN INSURABLE INTEREST IN THE PROPERTY UPON ITS ROUTE FOR WHICH IT MAY BE SO HELD LIABLE, AND MAY PROCURE INSURANCE THEREON IN ITS OWN BEHALF."

§ 188. The Effect of this Provision. — The question whether or not this provision has the effect to limit this statutory liability of the railroad to property in which it has an insurable interest, has been raised in several

the finding that the fire was communicated by the engines was not warranted." *McGinn v. Platt*, 177 Mass. 125 (1900).

³¹ *Ross v. Boston & Worcester Railroad*, 6 Allen, 87, 92 (1863); *McGinn v. Platt*, 177 Mass. 125, 127 (1900).

In *Bowen v. Boston & Albany Railroad*, 179 Mass. 524, 525 (1901), it was held that evidence introduced by the plaintiff in rebuttal "tending to show that diamond stack engines with spark arresters and netting of the standard kind, all in good condition, would throw sparks and set fires and had done so; that there were no appliances that would prevent a locomotive under all circumstances from throwing out live sparks and setting a fire; and that an engine with an extension front and a spark arrester with a netting of the kind exhibited would sometimes give out live cinders so as to set a fire" was competent "in reply to the testimony introduced by the defendant tending to show that the engines which ran by the plaintiffs' mill on the defendant's road the day before the fire, including one or more diamond stack engines, were equipped with spark arresters and extension fronts and standard netting all in good condition, and would not and could not throw out sparks so as to set a fire. It bore directly upon the issue, which was whether the engines of the defendant caused or could have caused the fire."

cases,³² but no definite and complete answer has as yet been given to it. However, as to the kind of property injured or destroyed, it has been intimated that the question can have no application;³³ but, as to the extent of the property injured or destroyed, it has been suggested that since the insurable interest given to the railroad corporation is here limited to the property "upon its route, its liability can extend no further than to such property."³⁴

"IF IT IS HELD LIABLE IN DAMAGES, IT SHALL BE ENTITLED TO THE BENEFIT OF ANY INSURANCE EFFECTED UPON SUCH PROPERTY BY THE OWNER THEREOF, LESS THE COST OF PREMIUM AND EXPENSE OF RECOVERY."

§ 189. The Extent of the Liability limited by this Provision.
— Prior to 1895 the liability of a railroad under this statute was primary and that of an insurance company under its contract was secondary, in order of ultimate liability for the injury or destruction of property in which both were interested.³⁵ By the amendment of 1895, which was re-enacted in this provision, the legislature has changed this order of ultimate liability. The broad, general effect of this legislative change in the statute has been to limit the liability of the railroad corporation "to such amounts as are not covered by insurance, and in cases where there is insurance to leave the primary liability on the insurance company, where it would be if there were no statute imposing a burden on railroad companies."³⁶ And the fact that the insurance was issued prior to the passage of the amendment of 1895 will not alter this result.³⁷

³² *Trask v. Hartford & New Haven Railroad*, 16 Gray, 71 (1860); *Ross v. Boston & Worcester Railroad*, 6 Allen, 87, 91 (1863).

³³ *Ross v. Boston & Worcester Railroad*, 6 Allen, 87, 91 (1863).

³⁴ *Hart v. Western Railroad*, 13 Met. 99, 104 (1847).

³⁵ *Hart v. Western Railroad*, 13 Met. 99, 105 (1847).

³⁶ *Lyons v. Boston & Lowell Railroad*, 181 Mass. 551 (1902).

It is further held in that case, at page 553, that this provision was "applicable as well when a policy is made payable in case of loss to a mortgagee as when the insurance is for the owner alone."

³⁷ *Lyons v. Boston & Lowell Railroad*, 181 Mass. 551 (1902), Holmes, C. J., Loring and Hammond, JJ., dissenting.

PART IV.

THE LIABILITY OF STREET RAILWAYS FOR INJURIES DUE TO THE MANAGEMENT AND USE OF THEIR TRACKS, AND DURING THE CONSTRUCTION, ALTERATION, ETC., OF THEIR RAILWAYS.

REVISED LAWS, CHAPTER 112, SECTION 44. . . . A street railway company shall be liable for any loss or injury which may be sustained by any person in the management and use of its tracks and during the construction, alteration, extension, repair or renewal of its railway, or while replacing the surface of any street which may have been disturbed as aforesaid, and which results from the carelessness, neglect or misconduct of its agents or servants who are engaged in the prosecution of such work, if notice of such loss or injury is given to the company and an action therefor is commenced in the manner provided by section twenty of chapter fifty-one. . . .

§ 190. The Liability at Common Law and under this Statute. — It is the rule at common law that street railway companies are liable for injuries due to the negligent use and management of their tracks: "the principle *sic utere tuo ut alienum non laedas* applies to their tracks as well as to their cars."¹ It is also the rule at common law that they are liable for injuries to travellers upon the highway during the construction and alteration of their railways which result from negligence.² It may be doubted, therefore, whether this statute has done much, if anything, more than to declare the common law.³ The liability under the statute is, however, somewhat more restricted than that at common law by reason of the requirement, introduced by the final provision, of the giving of a notice of the time, place and cause

¹ McKenna v. Metropolitan Railroad, 112 Mass. 55, 57 (1873).

² Brookhouse v. Union Railway, 132 Mass. 178 (1882).

³ Osgood v. Lynn & Boston Railroad, 130 Mass. 492 (1881). In this case it was held that an action for loss of the services and society, and for the expense of curing, the plaintiff's wife, who was injured by the defendant's tracks, might be maintained. The statute "makes the corporation liable, in the broadest terms, for any loss or injury sustained by any person by reason of its negligence."

of the accident and of the beginning of the action within two years.

§ 191. **When the Requirement as to Notice does not apply.** — The history and language of this statute show, it has been held, that the provision which requires the giving of a notice of the time, place and cause of the accident does not apply to a case where the accident occurs upon the private property of the defendant.⁴

PART V.

THE LIABILITY OF PROPRIETORS OF STEAMBOATS AND STAGE-COACHES, AND OF OTHER CARRIERS FOR CAUSING THE DEATH OF A PASSENGER.

REVISED LAWS, CHAPTER 70, SECTION 6. If the proprietor of a steamboat or stage coach or a common carrier of passengers, except a railroad corporation or street railway company,¹ by reason of his or its negligence, or by reason of the unfitness or gross negligence or carelessness of his or its servants or agents, causes the death of a passenger, he or it shall be liable in damages in the sum of not less than five hundred nor more than five thousand dollars which shall be assessed with reference to the degree of culpability of the proprietor or common carrier liable, or of his or its servants or agents, and shall be recovered in an action of tort, commenced within one year after the injury which caused the death, by the executor or administrator of the deceased, one-half to the use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin.

§ 192. **The Nature and Construction of the Statute.** — This statute is essentially penal in its nature. Its primary purpose is to impose punishment for carelessness upon the

⁴ *Joslyn v. Milford, Holliston & Framingham Street Railroad*, 184 Mass. 65, 68 (1903).

¹ This provision excepting railroad corporations and street railway companies, first appears in the revision of 1902, and is in accordance with the decision in *Holland v. Lynn & Boston Railroad*, 144 Mass. 425, 427, 428 (1887).

The first act imposing this liability was passed by the legislature in

specified carriers. It differs, however, from purely penal legislation in that it gives the amount of the penalty, when recovered, to the widow and the next of kin of the deceased, not as damages for the loss sustained by them because of the carelessness of the carrier, but as a sort of gratuity.²

Since the language of the statute is substantially that of the first portion of section two hundred and sixty-seven of chapter one hundred and eleven of the Revised Laws, a similar construction, it would seem, will be given to its various provisions to that given to like provisions in the section to which reference is made.³

1840. Acts, 1840, ch. 80. As then enacted, it applied also to railroads. In 1853 the statute was so amended as to remove railroads from its operation. Acts, 1853, ch. 414. Since that date it has been repeatedly re-enacted with merely verbal changes. Gen. Sta. ch. 160, § 34; Acts, 1881, ch. 199, §§ 3, 5, 6; Pub. Sta. ch. 73, § 6. And see note 1, part I of this chapter.

² See *Carey v. Berkshire Railroad*, 1 *Cush.* 475, 480 (1848).

³ See Part I. of this Chapter..

The cases decided under this statute in its present form are very few. *Comm. v. East Boston Ferry Company*, 13 *Allen*, 589 (1866), and *Comm. v. Coburn*, 132 *Mass.* 555 (1882), are believed to comprise the whole list.

CHAPTER IV

THE STATUTORY LIABILITIES OF DEALERS IN INTOXICATING LIQUORS.

PART I.

THE LIABILITY WHERE INJURY TO PERSON, PROPERTY OR MEANS OF SUPPORT RESULTS IN CONSEQUENCE OF INTOXICATION.

REVISED LAWS, CHAPTER 100, SECTION 58. A husband, wife, child, parent, guardian, employer or other person who is injured in person, property or means of support by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, jointly or severally, against any person or persons who, by selling or giving intoxicating liquor, have caused in whole or in part such intoxication; and any person or persons who own, rent, lease, or permit the occupation of any building or premises, and have knowledge that intoxicating liquor is to be sold therein, or who, having leased the same for other purposes, knowingly permit therein the sale of intoxicating liquor, shall, if any such liquor sold or given therein causes in whole or in part the intoxication of a person, be liable jointly or severally with the person or persons who sell or give intoxicating liquor as aforesaid, for all damages sustained; and the same may be recovered in an action of tort; but a lessor of real estate shall not be liable for such damages if the occupant holds a license for the sale of such liquor; and an owner or lessor of any building or premises held under lease on the thirtieth day of April in the year eighteen hundred and seventy-nine shall not be liable, under the provisions of this section, for any damage resulting from the lawful sale or giving away of spirituous or intoxicating liquor on said premises during the term of such lease. A married woman may bring such action in her own name, and all damages recovered by her shall inure to her separate use; and all damages recovered by a minor shall be paid either to such minor, or to such person in trust for him, and on such terms, as the court may order.

Upon the death of either party, the action and right of action shall survive to or against his executor or administrator. The party injured, or his or her legal representative, may bring either a joint action against the person intoxicated and the person or persons who furnished the liquor, or a separate action against either. If a judgment, which may be recovered under the provisions of this section against a licensee, remains unsatisfied for thirty days after the entry thereof, the board which granted his license shall revoke it; and no license shall be granted to a person against whom such judgment has been recovered until the same is satisfied.¹

§ 193. As to the Constitutionality of the Statute. — This statute, it has been held, is not unconstitutional because in derogation of the contract of license. "The license is not a contract. The license is simply an authority to sell according to law, and subject to all the limitations, restrictions and liabilities which the law imposes."² Nor is it unconstitutional because it makes a licensed seller of intoxicating liquors liable for an injury done by a buyer, where he had a right to make the sale. "As the Legislature, in the exercise of its police power, has the right to prohibit absolutely the sale of intoxicating liquors, it has the right to allow them to be sold on such terms and conditions as it sees fit to impose."³

§ 194. No Similar Liability at Common Law. — The liability created by the provisions of this statute is a departure from the common law. It furnishes a remedy where none

¹ This statute had its beginning in 1855, when an act was passed by the legislature giving a right of action against dealers in intoxicating liquors "if any person in a state of intoxication shall commit an assault and battery, or injure any property . . . if the liquor was furnished in violation of this act." Acts, 1855, ch. 215, § 22.

The statute was several times re-enacted without any material departure from that form. Gen. Sts. ch. 86, § 39; Acts, 1869, ch. 415, § 41; Acts, 1875, ch. 99, § 14. In 1879 it was amended so as to read substantially as at present. Acts, 1879, ch. 297, § 1. The exemption of lessors of buildings from liability is added by Acts, 1880, ch. 250, § 1, while the provision as to the revocation of the license in case of the failure to pay a judgment recovered in an action under the statute is added by Acts, 1880, ch. 239, § 4. The form in the Public Statutes, Pub. Sts. ch. 100, § 21, is substantially that in the Revised Laws.

² Moran v. Goodwin, 130 Mass. 158, 160 (1881).

³ Howes v. Maxwell, 157 Mass. 333, 334 (1892).

existed before. It is rather, therefore, to be strictly construed, as in derogation of the rules of the common law.⁴

§ 195. **The Extent of the Liability.**—The provisions of this statute do not give a right of action for the death of a person, even though such death was directly in consequence of intoxication. Thus, where the plaintiff's husband was injured by the cars in consequence of his intoxication, and soon afterward died from the injury so received, whereby the plaintiff was entirely deprived of her means of support, it was held that the liability to respond in damages under the statute was limited to the lifetime of the husband, and that this suit, being an action for the death, could not be maintained.⁵

Although the statute gives the right to bring several actions based upon the same facts, the liability does not extend beyond the recovery of the damages actually sustained. Hence satisfaction from any one of several jointly liable will discharge all of the others.⁶

"A HUSBAND, WIFE, CHILD, PARENT, GUARDIAN, EMPLOYER OR OTHER PERSON"

§ 196. **The Effect of this Provision.**—Speaking of these words in one of the earliest cases decided under this statute,⁷ Mr. Justice Lord says: "We think this phraseology has a force, and gives character to the purpose of the Legislature, and the objects to be accomplished by it, beyond what would be found in the use of language as ordinarily applied in a statute, 'any person who shall be injured,' etc. We think the language itself imports that the relations of husband and wife, parent and child, guardian and ward, employer and

⁴ Aldrich *v.* Parnell, 147 Mass. 409, 411 (1888).

⁵ Barrett *v.* Dolan, 130 Mass. 366 (1881); Harrington *v.* McKillop, 132 Mass. 567 (1882).

⁶ Aldrich *v.* Parnell, 147 Mass. 409 (1888).

A mere agreement by one of several jointly liable to pay a certain sum in settlement will not, however, afford any defence nor even serve to limit the amount of damages that may be recovered. Herrmann *v.* Orcutt, 152 Mass. 405 (1890).

⁷ Moran *v.* Goodwin, 130 Mass. 158, 160 (1881).

employed, are valuable relations; that they are themselves the subject of injury; that those relations themselves may be so affected by the excessive use of intoxicating liquors as to constitute a substantial injury. That is, that drunkenness of a husband may be of substantial injury to the wife; of the wife, to the husband; of the parent, to the child; of the child, to the parent, etc.; and the subsequent provision that a married woman may sue in her own name and recover damages to her separate use, and the provision that a minor child may recover damages which shall be secured to the minor himself or to a trustee for his use, as the court may direct, tend also very strongly to show that the Legislature regarded as capable of injury the family and social relations, which drunkenness abases and destroys, and that the extent of such injury is a proper subject of judicial inquiry."

"WHO IS INJURED IN PERSON, PROPERTY OR MEANS OF SUPPORT"

§ 197. The Meaning of the Words "Means of Support."— This phrase, "means of support," does not refer to the legal obligation⁸ to support dependent kindred. It means simply the actual means of support. It is enough, therefore, for the person injured to show, as matter of fact, partial dependence for support upon the intoxicated person or the person injured by the intoxicated person, and that the means afforded by such person have been taken away in consequence of the intoxication.⁹

§ 198. A Husband may be injured in his Means of Support.— Since the essence of the injury contemplated by the

⁸ Revised Laws, ch. 81, § 10, imposes such obligation.

⁹ McNary v. Blackburn, 180 Mass. 141, 144 (1901). In this case, which was an action by parents jointly for an injury in their means of support in consequence of the intoxication of their son, it appeared that they lived in Nova Scotia, had a considerable family to support, and made a living by fishing; that the mother had at times sent to the son in question for money; that he had sent her money; that the money so sent was used for support in the household; and that he was permanently disabled in part by an accident due to this intoxication. It was held that this help of the son "was one of the plaintiffs' means of support" and loss of it entitled them to maintain this action.

statute is an injury to the relations enumerated therein, a husband, although the source of all the income of the household, may very clearly, in law, be injured in his means of support. And he will be held to be so injured in fact as well where it appears that he depended upon his wife to care for his minor children, to look after his home, and to perform duties of a like nature, which she became incapable of performing in consequence of intoxication.¹⁰

Whether or not a wife is a means of support to her husband, and how far this means of his support is injured by her intoxication, are both questions of fact to be determined by the jury upon proper instructions.¹¹

§ 199. The Injury to the Means of Support may be because of the Disabling, but not because of the Death, of the Intoxicated Person. — The means of support of any of the enumerated parties may be injured, within the meaning of this statute, by the disabling, whether temporary or permanent, of the intoxicated person, due to his intoxication.¹² Thus it has been held that where the intoxicated person was permanently disabled in consequence of an accident on the railroad, which was due to his intoxication, so that his ability to contribute to the support of his parents, as he had done in the past, was destroyed, there was an injury to their means of support for

¹⁰ *Moran v. Goodwin*, 130 Mass. 158, 160 (1881).

"That the relation of husband and wife may be such that in fact, as well as in law, the wife may be wholly or in part a means of support to her husband, is very clear." S. C.

¹¹ *Moran v. Goodwin*, 130 Mass. 158, 160 (1881). In this case the instruction to the jury, which was held to be proper, was: "Although the wife was under no legal obligation to support her husband, yet the jury are authorized to return a verdict for the plaintiff, if the evidence in the case satisfies them that the plaintiff's wife, when sober, did the work in his family, including cooking, washing and the general care of the house and the care of his minor children, and that by reason of the intoxication of his wife, caused by intoxicating liquors sold to her by the defendants, she was rendered incapable of performing said work and taking care of his house and children, and he thereby lost her services in those respects."

¹² *McNary v. Blackburn*, 180 Mass. 141, 143 (1901); *Colburn v. Spencer*, 177 Mass. 473 (1901).

which they were entitled to recover compensation in an action under this statute.¹³

But such injury does not extend beyond the lifetime of the disabled person: as already pointed out, the statute does not give a right of action for the death of a person.¹⁴

"BY AN INTOXICATED PERSON, OR IN CONSEQUENCE OF THE INTOXICATION, HABITUAL OR OTHERWISE, OF ANY PERSON,"

§ 200. In Consequence of the Intoxication. The Formation of Habits of Intoxication. Knowledge of such Habits. — The injury to the plaintiff must be the proximate result of intoxication actually caused by intoxicating liquors sold or given by the defendant. It is not enough, therefore, to show that the intoxicating liquors, sold or given by the defendant, contributed to the formation of habits of intoxication: he may contribute to the formation of such habits by a person "without ever having proximately, in whole or in part, caused him to become intoxicated."¹⁵

Knowledge on the part of the defendant that a person was accustomed to get intoxicated is not an essential element in an action under this statute. He is liable, therefore, whether he had such knowledge or not.¹⁶

"SHALL HAVE A RIGHT OF ACTION IN HIS OR HER OWN NAME, JOINTLY OR SEVERALLY, AGAINST ANY PERSON OR PERSONS WHO, BY SELLING OR GIVING INTOXICATING LIQUOR, HAVE CAUSED IN WHOLE OR IN PART SUCH INTOXICATION;"

§ 201. The Averment of the Time of the Selling of the Intoxicating Liquors. — The averment in a declaration based

¹³ McNary v. Blackburn, 180 Mass. 141 (1901).

Just how the accident which results in the disability happened, if due to his intoxication, is not material. Colburn v. Spencer, 177 Mass. 473 (1901). And it was held in that case that it was a reasonable inference from the evidence that the accident was due to his intoxication.

¹⁴ Barrett v. Dolan, 130 Mass. 366 (1881); Harrington v. McKillop, 132 Mass. 567 (1882). And see § 195, *ante*.

¹⁵ Bryant v. Tidgewell, 133 Mass. 86, 91 (1882). "A habit of becoming intoxicated is distinguishable from actual intoxication."

¹⁶ Edwards v. Woodbury, 156 Mass. 21, 26 (1892).

upon this statute of a sale of intoxicating liquor "on or about" a day named, need not be proved as averred. "The only absolute legal limit is that the time proved must be within the statute of limitations applicable to the action."¹⁷

And so where a declaration alleges a sale of intoxicating liquor on a day named and "at divers other times between said day and the date of the writ," proof of a sale on one occasion within the time alleged is sufficient.¹⁷

§ 202. **Where the Intoxication is caused in Part by Persons other than the Defendant.** — Any party who contributes, by the selling or giving of intoxicating liquors, to the intoxication of a person, in consequence of which such an injury as is mentioned in this statute is done, is liable under its provisions. Consequently, the fact that the intoxicated person purchased a part of the liquor which caused his intoxication from parties other than the defendant will afford him no defense, even though the injury would not have been done if his intoxication had not been aggravated by such additional purchases.¹⁸ Nor will such fact even give rise to a right to have the amount of the damages for that injury apportioned.¹⁸

§ 203. **"Jointly or severally."** **The Position of those who contribute to the Intoxication.** — The statute in terms gives a right of action against each one alone, or against all together, who, by the selling or giving of intoxicating liquors, contribute to the intoxication in consequence of which the injury was done. The effect of the provisions of the statute is,

¹⁷ *Edwards v. Woodbury*, 156 Mass. 21 (1892). It was also held in this case that the cause of action given by this statute did not come within the provisions of Rev. Laws, ch. 202, § 4, which establish the limit of two years for the bringing of certain actions.

"There are reasons, perhaps, why, in an action of this kind, great pains should be taken to secure to a defendant an opportunity to meet the case proved by the plaintiff, because the injuries to the plaintiff are not likely to be within the knowledge of the defendant." *Edwards v. Woodbury*, 156 Mass. 21, 26 (1892).

¹⁸ *Bryant v. Tidgewell*, 133 Mass. 86, 90 (1882).

Where the declaration does not in terms allege that the defendant wholly caused the intoxication, "it is sufficient to support the action to prove that the defendant caused it in whole or in part, for this is the language of the statute." *Edwards v. Woodbury*, 156 Mass. 21, 26 (1892).

therefore, to put all who contribute to the intoxication in the position of joint tortfeasors or trespassers.¹⁹

The result of this situation is that the common law rule which holds that the release of one of several joint tortfeasors releases all, applies with like force and effect to rights of action given by this statute.¹⁹

PART II.

THE LIABILITY FOR SELLING LIQUORS TO A PERSON CONTRARY TO NOTICE.

REVISED LAWS, CHAPTER 100, SECTION 63. The husband, wife, parent, child, guardian or employer of a person who has the habit of drinking spirituous or intoxicating liquor to excess, or the mayor of the city or one of the selectmen of the town in which such person lives, may give notice in writing, signed by him or her, to any person requesting him not to sell or deliver such liquor to the person having such habit. If the person so notified at any time within twelve months thereafter sells or delivers any such liquor to the person having such habit, or permits him to loiter on his premises, the person giving the notice may, in an action of tort, recover of the person notified such amount, not less than one hundred nor more than five hundred dollars, as may be assessed as damages; but an employer who gives such notice shall not recover unless he is injured in his person or property, and a druggist or apothecary shall not be liable hereunder for a sale made upon the prescription of a physician. A married woman may bring such action in her own name, and all damages recovered by her shall inure to her separate use. A mayor or selectman may bring such action in his own name for the benefit, at his election, of either the husband, wife, child, parent or guardian of the person having such habit. Upon the death of either party or of the person beneficially interested in the action, the action and right of action shall survive to or against or for the benefit of his executor or administrator.¹

¹⁹ Aldrich *v.* Parnell, 147 Mass. 409, 411 (1888).

In *Howes v. Maxwell*, 157 Mass. 333 (1892), an action of contract on a bond executed by a liquor dealer, under Rev. Laws, ch. 100, § 42, to recover the amount of a judgment rendered against him in an action of tort brought under this statute, was sustained.

¹ This statute appears to have its origin in early legislation which

§ 204. The Nature of the Liability.—The provisions of this statute create a liability where none exists at common law. It is, therefore, to an extent outside the common law rules, notably those relating to the assessment of damages.²

Since the chief object of the statute appears to be to punish dealers in intoxicating liquors for making sales under the circumstances specified, it is essentially penal in character, and hence subject to the rules of construction usually applied to statutes of that nature.²

"THE HUSBAND, WIFE, PARENT, CHILD, GUARDIAN OR EMPLOYER"

§ 205. Who may sue. The Essence of the Liability.—The right to give the notice and to maintain the action for which provision is made in this statute, is confined to persons holding some one relationship of those specified to the person who has the habit of drinking intoxicating liquors to excess. The existence of such relationship is absolutely essential to the right to sue.³

And it is the injury to such relationship due to the habit of drinking spirituous or intoxicating liquors to excess, that constitutes the basis of the liability. "The statute contemplates that the habitual drunkenness of a husband or wife, parent or child, is a substantial injury to those bound together in domestic relations, and gives such a right to recover damages in the nature of a penalty, not only for any injury

imposed a penalty upon dealers in intoxicating liquors for selling to a person after notice given by the selectmen of a town. C. L. ch. 85, § 2; Acts, 1786, ch. 68, §§ 16, 17; Acts, 1818, ch. 65, § 1; Acts, 1832, ch. 166, §§ 12, 14; Rev. Sts. ch. 47, §§ 14, 15. In 1855 the statute was so amended as to turn the penalty into a civil liability, the language used for that purpose being practically the same as in the present revision. Acts, 1855, ch. 215, § 21. In this form it has been repeatedly re-enacted. Gen. Sta. ch. 86, § 38; Acts, 1861, ch. 136, § 4; Acts, 1868, ch. 141, §§ 15, 17; Acts, 1869, ch. 415, § 40; Acts, 1875, ch. 99, § 16; Pub. Sts. ch. 100, § 25. And see Acts, 1885, ch. 282; Acts, 1897, ch. 398, § 5.

² *Sackett v. Ruder*, 152 Mass. 397, 404 (1890).

³ *Sackett v. Ruder*, 152 Mass. 397 (1890).

to the person or property, but for the shame and disgrace brought upon them.”⁴

§ 206. The Right of Action not limited to Minor or Dependent Children. — Since the essence of the liability is an injury to any relationship of those specified, the right of a child to recover under the statute rests upon the relation of parent and child and is in no way affected by the question of the age of the child or of his or her dependence upon the parent for support. Hence an adult son or daughter, who is independent of the parent so far as support is concerned, may maintain the action after giving the required notice.⁵

“OF A PERSON WHO HAS THE HABIT OF DRINKING SPIRITUOUS OR INTOXICATING LIQUOR TO EXCESS,”

§ 207. The Habit of Drinking to Excess. The Defendant's Knowledge of such Habit. — The existence of a habit of drinking spirituous or intoxicating liquors to excess on the part of the relative in question, is the essential element in the plaintiff's case. It is that which gives validity to the notice and constitutes the foundation of the right of action under this statute. The burden of establishing the fact rests, of course, upon the plaintiff.⁶

A dealer in such liquors who receives a notice such as is described in the statute, from a person entitled to give it, is bound to make inquiry as to the habits of the person named therein, if he is not informed, by the notice or otherwise, as to them. In such a case he cannot proceed to sell without making such inquiry and escape liability, if the habit did in fact exist.⁶

“MAY GIVE NOTICE IN WRITING,”

§ 208. By whom the Notice must be given. — The notice referred to in this provision can be given only by a person who holds such a relationship to the individual who has the

* Taylor v. Carroll, 145 Mass. 95, 96 (1887).

• Taylor v. Carroll, 145 Mass. 95 (1887).

* Tate v. Donovan, 143 Mass. 590 (1887).

habit of drinking to excess as the statute specifies, or by the officials named. Such a notice given by any other person cannot be made the basis of an action under this statute. And a person receiving such a notice is not put upon his inquiry as to the relationship existing between the giver of it and the person named in it. Consequently, if the relationship is not expressly stated, the person giving it must show that the receiver of it "understood, that is, knew or believed, that such a relationship existed."⁷

The relationship between the giver of the notice and the person named in it, though not expressly stated, may be gathered from the document as a whole. Thus, when the notice forbade the sale of liquor to I. N. Taylor, and was signed "I. N. Taylor, Jr.", it was held that the relation of father and son sufficiently appeared.⁸

§ 209. The Sufficiency of the Notice.— In order sufficiently to comply with the requirements of this provision, a notice need not follow the language of the statute, nor use any particular form of words. "It is sufficient, if it conveys to the person notified, in clear and unmistakable terms, the substance of the requirement of the statute."⁹ It has been held,

⁷ *Sackett v. Ruder*, 152 Mass. 397, 402 (1890).

In the course of the opinion in this case Chief Justice Field, at page 403, says: "It is going too far to hold that a person is put on his inquiry by any notice that may be given. It is only when a person is notified in accordance with the statute that it can reasonably be held that he is put upon inquiry. The statute fairly implies that the person notified must have notice, or knowledge, that one of the persons named in the statute has given him notice in pursuance of the statute. A reasonable cause to believe is not the same thing as actual belief, and we think that it must be shown that the person notified understood in some manner that one of the persons named in the statute had given him the notice, if the notice itself does not state this."

⁸ *Taylor v. Carroll*, 145 Mass. 95 (1887). The court says of this notice: "It is a notice by a son to the defendant requesting him not to sell intoxicating liquor to his father. The signature imports that the signer is the son of the I. N. Taylor named in the body of the notice." And see *Sackett v. Ruder*, 152 Mass. 397, 402 (1890).

⁹ *Kennedy v. Saunders*, 142 Mass. 9, 11 (1886). In this case the following notice was held to be sufficient: "My husband has been in the habit of getting liquor here and coming home drunk. . . . I don't want you to give him any more drink."

therefore, that a notice was sufficient which did not contain the words "spirituous or intoxicating liquor";¹⁰ which did not state that the person named in it had the habit of drinking liquor to excess;¹¹ which did not show that the required relationship existed between the giver of it and the person named in it, provided the fact was otherwise made known to the defendant.¹²

"SIGNED BY HIM OR HER, TO ANY PERSON REQUESTING HIM NOT TO SELL OR DELIVER SUCH LIQUOR TO THE PERSON HAVING SUCH HABIT."

§ 210. The Signing of the Notice.—The statute does not "in terms require the plaintiff's 'written signature,' but only that the notice should be 'signed.' Signing does not necessarily mean a written signature, as distinguished from a signature by mark, by print, by stamp, or by the hand of another. There is no reason that we can see why a signature in the proper handwriting of the plaintiff should be required."¹³

It has been held accordingly that where the plaintiff's name was written by another person, at her request and in her presence, she knowing and understanding the contents and object of the notice, this was a sufficient compliance with the requirement of this provision of the statute.¹⁴

§ 211. The Request not to sell or deliver such Liquor.—The words "spirituous or intoxicating liquor" need not be used in expressing the request not to sell or deliver such liquor to the person named in the notice; nor need any particular words be used. Any form of language which makes the meaning clear, so that the person receiving the notice must

¹⁰ *Kennedy v. Saunders*, 142 Mass. 9 (1886).

¹¹ *Tate v. Donovan*, 143 Mass. 590 (1887).

"The failure to make such a statement can work no injury to a seller, who must be presumed to be aware that the validity of the notice depends upon the habits of the person to whom he is notified not to sell."

¹² *Taylor v. Carroll*, 145 Mass. 95 (1887); *Sackett v. Ruder*, 152 Mass. 397, 402 (1890).

¹³ Mr. Justice Allen in *Finnegan v. Lucy*, 157 Mass. 439, 443 (1892).

¹⁴ *Finnegan v. Lucy*, 157 Mass. 439 (1892).

understand it as such a request, is a compliance with the requirements of this provision.¹⁵ Hence the words, "I don't want you to give him any more drink," have been held to be a sufficient request not to sell or deliver such liquor.¹⁶

"IF THE PERSON SO NOTIFIED AT ANY TIME WITHIN TWELVE MONTHS THEREAFTER SELLS OR DELIVERS ANY SUCH LIQUOR TO THE PERSON HAVING SUCH HABIT, OR PERMITS HIM TO LOITER ON HIS PREMISES,"

§ 212. The Right of Action extends to every Sale or Loitering within Twelve Months after the Notice. — The right of action given by this statute is not limited to the recovery of one sum for loitering or one sum for selling or delivering liquor. The effect of the notice is not exhausted by such single recovery, but continues throughout the entire period of twelve months.¹⁶ As to this point Mr. Justice Gardner says:¹⁷ "The words 'at any time within twelve months thereafter,' as used in the statute, empower the one who has given the notice to recover of the person notified for each sale or delivery of intoxicating liquor to the person having such habit, and for each time such person is permitted to loiter, etc., during the twelve months after the notice has been given. This interpretation of the statute carries out the purpose of its enactment."

§ 213. That a Sale made after Notice was by an Agent is no Defence. — The general rule of the law of master and servant which makes the master "responsible for the wrongful acts of his servant done in the execution of the authority given by the master, and for the purpose of performing what the master has directed, whether the wrong done be occasioned by the mere negligence of the servant, or by a wanton and reckless purpose to accomplish the master's business in an unlawful manner," applies to actions brought under this

¹⁵ *Kennedy v. Saunders*, 142 Mass. 9 (1886).

As pointed out by the court in *Tate v. Donovan*, 143 Mass. 590, 591 (1887), "the persons by whom such notices are given must often be unlettered persons, unfamiliar with any niceties of legal expression."

¹⁶ *Kennedy v. Saunders*, 142 Mass. 9, 11 (1886).

¹⁷ In *Kennedy v. Saunders*, 142 Mass. 9 (1886), at page 12.

statute, with the same force and effect as at common law. The fact, therefore, that after the receipt of the notice the defendant did not personally make any sales to the person named therein and ordered his barkeeper not to make any such sale, and whatever sales were made were without his knowledge and consent, affords no defence.¹⁸

§ 214. The Allegation and Proof of the Time of Sales made after Notice. — In actions based upon this statute, it is not necessary, when a sale on a day named is alleged in the declaration, to prove that it was made on that very day. But where a sale is alleged to have been made within a specified period, a sale within that period must be proved.¹⁹

“THE PERSON GIVING THE NOTICE MAY, IN AN ACTION OF TORT, RECOVER OF THE PERSON NOTIFIED SUCH AMOUNT, NOT LESS THAN ONE HUNDRED NOR MORE THAN FIVE HUNDRED DOLLARS, AS MAY BE ASSESSED AS DAMAGES;”

§ 215. The Assessment of the Damages. — The word “damages” in this provision is not used in a strictly legal sense. While compensation for injuries to person or property may undoubtedly be recovered under this statute, it is not necessary to show damages of that character in order to recover: an injury to any relationship of those described, namely, husband and wife, parent and child, guardian and ward, is enough.²⁰ “Except in the case of an employer,” says Chief

¹⁸ *George v. Gobey*, 128 Mass. 289 (1880).

In the opinion in this case Mr. Justice Soule says, at page 290: “The defendant engages in the business of selling liquor voluntarily. He chooses to intrust the details of the business to a servant. If he forbids the making of sales to the intemperate person, and his servant negligently, through forgetfulness of the instruction given him, or through a failure to recognize the person, continues to make sales to that person, there is no reason why the defendant should not be responsible for the wrongful act. The sale is his sale, made in the performance of his business, and is an act within the general scope of the servant’s employment.” The court adds: “What would be the result if it appeared that the servant, knowing the instruction given by his master, made the sales with the intention of disobeying him, and for his own purposes, and not for the purpose of doing his master’s business, we have not considered.”

¹⁹ *Sackett v. Ruder*, 152 Mass. 397, 404 (1890).

²⁰ *Taylor v. Carroll*, 145 Mass. 95 (1887).

Justice Field,²¹ "the statute does not require that the person giving the notice, in order to maintain an action, should have been injured in person or property. . . . The husband, wife, parent, or child who may maintain the action, need not be dependent for support upon the person having the habit of drinking to excess, or have suffered anything which, by the common law, is considered as damages. . . . We think it clear that this is essentially a penal action, and that the common law rules concerning damages cannot be in all respects applied to it, and that it was competent for the court, if it saw fit, in order to assist the jury in determining the amount to be assessed within the limits prescribed, to admit evidence of the circumstances attending each violation of the statute complained of, and of the consequences which in whole or in part resulted from such violation, so far as they affected the relations between the plaintiff and her father."

²¹ *Sackett v. Ruder*, 152 Mass. 397, 404 (1890).

It was held in this case that the instruction: "There must be only one allowance of damages for one sale, and only one sale allowed for under any count," was correct, as also the instruction "that under the counts for loitering, and under the counts for sales, you are only to allow damages for a particular occasion,—some particular occasion proved other than the occasion when sales were made."

CHAPTER V.

THE STATUTORY LIABILITIES OF EMPLOYERS.

REVISED LAWS, CHAPTER 106, SECTION 71. If personal injury is caused to an employee, who, at the time of the injury, is in the exercise of due care, by reason of:

First, A defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied in consequence of, the negligence of the employer or of a person in his service who had been entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition; or,

Second, The negligence of a person in the service of the employer who was entrusted with and was exercising superintendence and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer; or,

Third, The negligence of a person in the service of the employer who was in charge or control of a signal, switch, locomotive engine or train upon a railroad;

The employee, or his legal representatives, shall, subject to the provisions of the eight following sections, have the same rights to compensation and of action against the employer as if he had not been an employee, nor in the service, nor engaged in the work, of the employer.

A car which is in use by, or which is in possession of, a railroad corporation shall be considered as a part of the ways, works or machinery of the corporation which uses or has it in possession, within the meaning of clause one of this section, whether it is owned by such corporation or by some other company or person. One or more cars which are in motion, whether attached to an engine or not, shall constitute a train within the meaning of clause three of this section, and whoever, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive engine or train shall be deemed to be a person in charge or control of a signal, switch, locomotive engine or train within the meaning of said clause.

§ 216. The Construction of the Statute. — The broad purpose of the legislature in enacting this statute, as the title of the original act¹ indicates and its provisions show, was to soften some of the harsh features of the old common law of master and servant, and so to place upon the statute books a law beneficial to the laboring classes. This obvious purpose furnishes a key to the interpretation of the whole act, — its terms are to be given a liberal construction, favorable to the employee just so far as the plain meaning of the words used will permit.² And this rule has, in general, been consistently applied in practice under the act.

There is also a further principle of general application to be taken into consideration in aid of the construction of this statute. The vital terms of the act, as is well known, were adopted, with only slight changes of phraseology and of detail, from the English Employer's Liability Act.³ The rule applies, therefore, that the interpretation which the English courts placed upon those terms prior to their enactment by the Massachusetts legislature must have very great, if not controlling, weight in determining the construction to be placed upon the same terms by the Massachusetts court.⁴

§ 217. The General Character of the Statute. — This statute, in its broad general aspects, is remedial in character.⁵ Some of its features, however, belong rather to the class of penal legislation, since their primary aim manifestly is to impose a penalty upon employers for the protection of the working men of the Commonwealth.⁶

¹ Acts, 1887, ch. 270. "An act to extend and regulate the liability of employers to make compensation for personal injuries suffered by employees in their service."

This act was approved May 14, 1887.

² The familiar rule relative to acts in derogation of the common law stands in the way of any interpretation that is more favorable to the employee than the plain meaning of the words employed by the legislature will permit.

³ 43 & 44 Vict. ch. 42, enacted in 1880.

⁴ *Comm. v. Hartnett*, 3 Gray, 450, 451 (1855); and see *Ryalls v. Mechanics' Mills*, 150 Mass. 190 (1889); *Mellor v. Merchants' Manufacturing Co.*, 150 Mass. 362, 363 (1890).

⁵ *Vetaloro v. Perkins*, 101 Fed. Rep. 393, 397 (1900).

⁶ See *Mulhall v. Fallon*, 176 Mass. 266, 269 (1900).

§ 218. **The General Effect of the Statute.**— Although the word “regulate” was used in the title of the original enactment,⁷ this statute is not, and was not intended to be, a codification of the whole law of master and servant. Outside of its scope still exist those duties and liabilities of employers that the common law has always recognized and enforced. The real effect of the statute has been simply to take those duties and liabilities as they stood at the passage of the act, and to enlarge them.⁷ This result it has brought about, speaking in general terms, in two ways: first, by abolishing some of the defences that the common law gave to the employer;⁸ and, second, by creating liabilities against him under circumstances where there were none at common law.⁹

§ 219. **The Common Law Liabilities of Employers not affected. May be enforced in the same Action as those under the Statute.**— The common law liabilities of employers not only retain their place in the system of Massachusetts law, but they are entirely unaffected by this act.¹⁰ Those provisions of the statute relative to procedure, such as the requirement of notice, the limitation of the time within which the action must be begun, the restriction of the amount of damages that may be recovered,— all apply simply and solely to actions based upon the statute, and hence in no way restrict actions at common law.¹¹

While as a general rule a plaintiff may, if he so desires, include in his declaration counts both at common law and under the statute, in an action by an administrator, brought under the provisions of section seventy-two for the benefit of the next of kin, a count under the statute for the death of an employee cannot be joined with a count at common law for his conscious suffering.¹² Under a declaration which properly

⁷ See *Ryalls v. Mechanics' Mills*, 150 Mass. 190 (1889).

⁸ See § 224, *post*.

⁹ See § 223, *post*.

¹⁰ *Coughlin v. Boston Tow-Boat Co.*, 151 Mass. 92 (1890); *Clark v. Merchants', etc. Transportation Co.*, 151 Mass. 352 (1890).

¹¹ See *Ryalls v. Mechanics' Mills*, 150 Mass. 190 (1889).

¹² *Brennan v. Standard Oil Co.*, 187 Mass. 376 (1905); *Hyde v. Booth*, 188 Mass. 290 (1905).

joins counts at common law and under the statute, it is usually a matter entirely within the discretion of the presiding judge whether the plaintiff shall be allowed to go to the jury on both counts, or shall be required to elect, at the close of the evidence, whether he will stand upon the counts at common law or upon those founded upon the statute;¹³ and if, when so required to elect, he chooses to pursue his remedy under this statute, the judgment in that action will be a bar to any subsequent proceeding at common law based upon the same cause of action.¹⁴ No exception will be sustained to a wise exercise of the discretion of the trial court in this matter.¹⁵

§ 220. Declaring under the Statute.— It is permissible for a plaintiff in actions under this statute to insert in his declaration counts based upon the different clauses of the first section; and if he has done so, he cannot be compelled at the trial to elect upon which of them he will go to the jury. This matter does not come within the discretion of the presiding judge.¹⁶ Relative to the point, the court has said: “The evidence in any particular case may make it uncertain on which ground the liability of the defendant depends, if there is any liability; therefore a plaintiff ought to be permitted to allege all the grounds of liability which there is any evidence to support, and these we think may properly be alleged separately in separate counts. . . . The whole liability of the defendant for the death of an employee ought to be tried in one action, and judgment in that action ought to be a bar to any subsequent action between the same parties for the same cause of action.”¹⁷

¹³ *Toomey v. Donovan*, 158 Mass. 232 (1893).

“Whether a plaintiff can be compelled to elect before the close of the evidence has not been decided, neither has it been decided that in every case of this class the trial court can or ought to compel the plaintiff to elect.” *Clare v. New York & New England Railroad*, 172 Mass. 211, 213 (1898).

¹⁴ *Clare v. New York & New England Railroad*, 172 Mass. 211, 213 (1898).

¹⁵ *Brady v. Ludlow Manufacturing Co.*, 154 Mass. 468 (1891); *Murray v. Knight*, 156 Mass. 518 (1892). See also *May v. Whittier Machine Co.*, 154 Mass. 29 (1891).

¹⁶ *Beauregard v. Webb Granite, etc. Co.*, 160 Mass. 201 (1893).

¹⁷ Chief Justice Field in *Beauregard v. Webb Granite, etc. Co.*, 160

But if the plaintiff has been required, at the trial, to make an election between counts both of which were based upon the statute, exceptions to that order will not be sustained, if it appears that he was not injured thereby.¹⁸

§ 221. The Application of the Statute to Municipal Corporations. — While the provisions of this statute apply as well to municipal corporations¹⁹ as to other employers of labor, it does not change the peculiar common law doctrines of agency that apply to such corporations. It does not by itself, therefore, impose any liability upon them to their employees where an injury results from negligent acts done by their officers and agents in the course of the performance of a duty imposed upon them by law for the benefit of the public, and from the performance of which they derive no profit or advantage, even though the person whose negligent acts caused the injury may be one of those for whose negligence employers are made liable by this act. Thus, where an employee of a city was injured by the fall of a bank of gravel under which he was at work by the direction of the assistant superintendent of streets, who was at the time engaged in taking out gravel for use in repairing a public street, it was held that since the assistant superintendent of streets was a public officer for whose negligence in the course of the performance of this public duty the city was not liable at common law, the plaintiff could not recover compensation for his injury under this statute.²⁰

Mass. 201, 202 (1893). The court adds: "There are not two causes of action, but only one, and the two counts state the different legal reasons why under the statute the defendant may be liable in damages for the death of Clement Beauregard."

¹⁸ Conroy *v.* Clinton, 158 Mass. 318 (1893).

¹⁹ Coan *v.* Marlborough, 164 Mass. 206 (1895); Connolly *v.* Waltham, 156 Mass. 368 (1892); Conroy *v.* Clinton, 158 Mass. 318 (1893); Norton *v.* New Bedford, 166 Mass. 48 (1896); Coughlan *v.* Cambridge, 166 Mass. 268 (1896); Taggart *v.* Fall River, 170 Mass. 325 (1898); McCoy *v.* Westborough, 172 Mass. 504 (1899); Lord *v.* Wakefield, 185 Mass. 214 (1904).

²⁰ McCann *v.* Waltham, 163 Mass. 344 (1895). Pettingell *v.* Chelsea, 161 Mass. 368 (1894); Mahoney *v.* Boston, 171 Mass. 427 (1898), accord. And see Collins *v.* Greenfield, 172 Mass. 78 (1898).

In Murphy *v.* Needham, 176 Mass. 422, 424 (1900), where the deceased

§ 222. Actions under the Statute in the Federal Courts. — If the facts of a case arising under this statute are such that the United States courts would have jurisdiction over it, the plaintiff has the option of bringing his action either in the State or the Federal court. In such a case it may oftentimes be an advantage to him to elect to sue in the latter tribunal, since it applies its own interpretation of common law rules, which interpretation may be more favorable to a plaintiff than that applied by the State court. Thus it seems that the well settled rule of the Federal courts which makes contributory negligence a matter of defence only, will be applied to cases under this statute.²¹ But in so far as the construction given to the terms of the statute itself is concerned, the one tribunal is no more favorable than the other: that general rule of practice which makes the interpretation given to the statutes of a State by the highest court of that State binding upon the United States courts, applies to actions based upon this act.²²

§ 223. The Creative Operation of the Statute. — This statute creates a new liability against employers, it seems, only under one set, or at most two sets, of circumstances: namely, where the death of the employee results from the accident; and, possibly, where the employee of an independent contractor or of a sub-contractor is injured by negligence that is attributed to the employer under the provisions of section seventy-six of the statute.²³ In this direction the scope of the statute is strictly limited to the cases specified in it, and cannot be broadened, even by the aid of the provisions of kindred statutes. Thus, it has been held that where an employee died

received his injuries while engaged, under the direction of the superintendent of streets of the defendant town, in getting out gravel to be used in making ordinary repairs upon one of its public highways, the court says: "The work in which the superintendent was engaged being done by him as a public officer, whatever orders or directions he may have given at the time of the accident are to be regarded as given in that capacity."

²¹ *Griffin v. Overman Wheel Co.*, 61 Fed. Rep. 568 (1894).

²² See *Leffingwell v. Warren*, 2 Black, 599, 603 (1862); *Canney v. Walkeine*, 113 Fed. Rep. 66 (1901).

²³ See § 307, *post*, and notes.

without conscious suffering, leaving no widow nor dependent next of kin, his administrator could not entitle himself to maintain an action under this statute by aid of the provisions of chapter 111, section 267, of the Revised Laws.²⁴

§ 224. The Destructive Operation of the Statute. The Defence of Common Employment. — What may perhaps be termed the destructive operation of this statute is to abolish the defence of common employment;²⁵ and that appears to be its only effect in this direction. It may hardly be necessary to add that the statute has not wholly abolished this defence, but only in those cases that come within its terms. Section seventy-one enumerates and describes the employees that are taken out of the category of fellow servants, and the list cannot be extended by construction so as to avoid the defence of common employment in cases involving the negligence of any employee other than those there specified.²⁶ There arises, thus, in every case the preliminary inquiry: Was the employee whose negligence caused the injury one of those for whose negligence the employer is made liable at the suit of a fellow servant, by the terms of this statute? The burden of establishing an affirmative answer to this question rests, of course, upon the plaintiff.²⁷

§ 225. The Waiver by the Employee of the Rights given to him by this Statute. — The question has not as yet been raised in this Commonwealth whether or not the rights given to the employee by this statute can be waived by the special agreement of the parties. As a matter of construction the Massachusetts court has approached the question only so far as to lay down the broad general principle that this statute does not restrict nor affect the right of employer and employee to make such agreements between themselves as they see fit.²⁸ Al-

²⁴ *Clark v. New York, etc. Railroad*, 160 Mass. 39 (1893). See also *Dacey v. Old Colony Railroad*, 153 Mass. 112, 117 (1891).

²⁵ See *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 136 (1893).

²⁶ *O'Keefe v. Brownell*, 156 Mass. 131 (1892).

²⁷ *Gibbs v. Great Western Railway Co.*, 12 Q. B. D. 208 (1884).

²⁸ See *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 137 (1893).

though this is a step toward an affirmative decision, the provisions of section sixteen, chapter one hundred and six of the Revised Laws,²⁹ appear to afford an effectual bar to further progress in that direction.

In England, however, it has been distinctly held that an employee may, by express contract, deprive himself of the benefit afforded by the act.³⁰ This decision the English court put upon the ground that since, as a general rule, entire freedom of contract has been preserved, such an agreement would come within that general rule, there being nothing in the wording of the statute to compel a different construction.

§ 226. **The Assumption of Risk. Defects in the Ways, Works or Machinery.**— It is a familiar doctrine of the law of master and servant that when a person enters a service he impliedly agrees to take upon himself the obvious risks incident to the performance of his duties under the then existing conditions, provided he is of sufficient capacity to understand and appreciate them.³¹ This doctrine of the assumption of risk, so far as it relates to dangers growing out of the defectiveness or inferiority of the employer's ways, works or machinery, continues in force under the employers' liability act, and applies to cases based upon it in the same manner, to the same extent and with the same effect as at common law.³² Therefore, whatever may be the difficulties of its

* This section reads as follows: No person shall, by a special contract with his employees, exempt himself from liability which he may be under to them for injuries suffered by them in their employment and resulting from the negligence of the employer or of a person in his employ.

** Griffiths v. The Earl of Dudley, 9 Q. B. D. 357 (1882).

▲ "The question in each case is not whether the employee has actually observed and by a conscious act of the will assumed all of the risks involved, but whether the risks are incident to and naturally grow out of the employment in which he is engaged, and are such as, taking his age, intelligence, and experience into account, he must be held to have appreciated if he saw, and such as, if he did not see, he could have seen and understood if he had looked. If the risks are of this character, then they are said to be obvious, and the employee assumes them." Mr. Justice Morton in Kenney v. Hingham Cordage Co., 168 Mass. 278, 282 (1897).

** Cassady v. Boston & Albany Railroad, 164 Mass. 168, 170 (1895); O'Maley v. South Boston Gas Light Co., 158 Mass. 135 (1893).

practical application, the rule is clear that if an employee is injured by reason of any danger incident to the condition of the ways, works or machinery the risk of which he must, under this doctrine, be deemed to have assumed, he cannot recover compensation under the first clause of this statute.³³

" It has been decided, under this doctrine, that a carpenter assumed the risk of falling through an opening in the floor of a building in the process of construction, *Beique v. Hosmer*, 169 Mass. 541 (1897), of being struck by a strip of board which caught on the teeth of a circular saw he was using and was thrown violently forward, *Tenanty v. Boston Manufacturing Co.*, 170 Mass. 323 (1898), of coming in contact with a band saw which was a part of the machinery of the plant where he was employed, but upon which he was not working and with which he was not familiar, *Arkland v. Taber-Prang Art Co.*, 184 Mass. 243 (1903); that a freight brakeman assumed the risk of striking against a gate post at the side of the defendant's tracks, *Austin v. Boston & Maine Railroad*, 164 Mass. 282 (1895); that a coal handler engaged in wheeling coal on a run assumed the risk of falling off the run by reason of the absence of guards, *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135 (1893), of being struck by the bucket of a steam shovel used in taking coal from the hold of a vessel, *McClusky v. Garfield & Proctor Coal Co.*, 180 Mass. 115 (1901); that a fireman assumed the risk incident to the condition of the floor of the boiler room, *Nealand v. Lynn & Boston Railroad*, 173 Mass. 42 (1899), also the risk incident to a defective runway used by him in wheeling out ashes, *Daily v. Fiberloid Company*, 186 Mass. 318 (1904); that a freight handler assumed the risk of the fall of a grain door which had been swung up and fastened against the roof of the car he was engaged in unloading, *Cassady v. Boston & Albany Railroad*, 164 Mass. 168 (1895); that a lamp trimmer employed to clean electric lights, who had never worked as a lineman nor had anything to do with the erection and care of poles, did not assume the risk of the fall of a pole due to its being rotten below the surface of the ground, *Dawson v. Lawrence Gas Light Co.*, 188 Mass. 481 (1905); that a lineman assumed the risk of coming in contact with an imperfectly insulated wire: "the danger from an imperfectly insulated wire is the most characteristic risk which a lineman has to encounter," *Chisholm v. New England Tel. & Tel. Co.*, 176 Mass. 125 (1900), and as well the risk of the breaking and falling of a rotten pole, *McIsaac v. Northampton Electric Lighting Co.*, 172 Mass. 89 (1898); *Tanner v. New York, New Haven & Hartford Railroad*, 180 Mass. 572 (1902), unless he is inexperienced and is set to do a particular work by a superior who knows that he is not experienced, *Lord v. Wakefield*, 185 Mass. 214 (1904); that a boy employed to run a duster in a woollen mill assumed the risk of having his hand caught in the teeth of the roller, *O'Connor v. Whittall*, 169 Mass. 563 (1897); that a gateman at a crossing who, after closing the gates for an approaching train, left his post and went between the tracks, assumed the risk of being struck by a stake used in moving certain cars of the train, *Tirrell v. New York, New Haven & Hartford Railroad*, 180 Mass. 490 (1902);

The fact that the fear of losing his place is one of the motives which induced the employee to continue at his work, does not affect the application of this doctrine. By continuing

that a loom fixer assumed the risk of having his arm caught in an unguarded gearing of a loom, *Goodridge v. Washington Mills Co.*, 160 Mass. 234 (1893); that a man experienced in packing liquors assumed the risk of injury from the bursting of a bottle of ale by reason of its being too lively, *Lehman v. Van Nostrand*, 165 Mass. 233 (1896); that an employee in a paper mill assumed the risk of slipping owing to the fact that the place where he was at work was wet, *Thompson v. Norman Paper Co.*, 169 Mass. 416 (1897); that an experienced quarryman assumed the risk incident to drilling out an unexploded blast, *Allard v. Hildreth*, 173 Mass. 26 (1899); that an employee in a mill assumed the risk of being caught on a set screw, which was a part of the machinery furnished for the work, *Donahue v. Washburn & Moen Manuf. Co.*, 169 Mass. 574 (1897), *Demers v. Marshall*, 172 Mass. 548 (1899), even though it was put in after the employment began, *Ford v. Mount Tom Sulphite Pulp Co.*, 172 Mass. 544 (1899); that an employee who undertakes to whitewash the walls of a card room while the machinery is in operation assumed the risk of coming in contact with a shaft, *Connelly v. Hamilton Woolen Co.*, 163 Mass. 156 (1895); that a spinner in a cordage factory where the passageway between machines was narrow assumed the risk of having her clothing caught in a rapidly moving belt and of being thus drawn into the machinery, *Kenney v. Hingham Cordage Co.*, 168 Mass. 278 (1897); that a street railway conductor who stepped upon the bumper of a car in order to disconnect and then to connect again the trolley as the car passed under a low bridge, assumed the risk of being thrown off by a jolt of the car, *McCauley v. Springfield Street Railway*, 169 Mass. 301 (1897); that a switchman assumed the risk of having his foot caught in a hole in the planking in the defendant's passenger yard, *Gleason v. New York & New England Railroad*, 159 Mass. 68 (1893); that a track repairer assumed the risk of injury from trains running "wild," *Sullivan v. Fitchburg Railroad*, 161 Mass. 125 (1894); that a weaver assumed the risk of slipping, because of the lack of light, as she passed down the alley of the weave room after work at night, *Donovan v. American Linen Co.*, 180 Mass. 127 (1901); that an employee experienced in various kinds of work, engaged in using a windlass or winch which had no clutch or ratchet, assumed the risk of being struck by its handles, *Cunningham v. Lynn & Boston Street Railway*, 170 Mass. 298 (1898).

Where the employee, a stone cutter, was injured by the fall of a derrick which he was expected to work under or near but with the management of which he had nothing to do, it was held that since he was not concerned with the derrick, except that it was so near the place where he was at work that it might injure him if it should fall, it could not be said, as matter of law, that he was negligent in working there, or that he had accepted the risk of injury. *McMahon v. McHale*, 174 Mass. 320, 324 (1899).

to work he none the less assumed the obvious risks incident to his employment.³⁴

As a rule of law, the operation of this doctrine of the common law is limited to such risks growing out of the condition of the ways, works or machinery as are open and obvious,—those the existence of which the employee knew or ought to have known when he entered the service.³⁵ And in a case involving injury by reason of such defects, the presiding judge may either take the case from the jury, or order a verdict for the defendant.³⁶

But where upon the evidence there is doubt whether the risk which resulted in the injury was one of the risks ordinarily incident to the work he was employed to do, the question whether the employee assumed that risk is for the jury to determine. This rule is well illustrated by the case of *Carroll v. New York, New Haven and Hartford Railroad*,³⁷ where the employee, a freight handler, was injured by the driving of a train at a rapid rate and without warning against a car he was engaged in loading, and there was some evidence tending to show that it was customary to give a warning under such circumstances; it was held that it could not be ruled, as matter of law, that the want of a warning was a risk of his employment which he assumed, but that the question was for the jury.

§ 227. Some Exceptions to the Doctrine of Assumption of Risk. Defects in the Ways, Works or Machinery.—There are certain exceptions to the rule as to the assumption of the risk incident to defects in the ways, works or machinery that

³⁴ *Lamson v. American Axe & Tool Co.*, 177 Mass. 144 (1900).

³⁵ *Austin v. Boston & Maine Railroad*, 164 Mass. 282 (1895).

³⁶ See cases cited in note 33.

Even though an employee must be held to have assumed the obvious risks of his employment, "this is not conclusive against his right to have compensation for his injury, if upon the evidence there was, back of the dangers of which he assumed the risk, some breach of duty toward him on the part of his employer which could fairly be found to have been the cause of the accident." The negligence of the superintendent may be such a breach of duty. *McPhee v. Scully*, 163 Mass. 216 (1895).

" 182 Mass. 237, 239 (1902). *Rafferty v. Nawn*, 182 Mass. 503 (1903), is a similar case.

are recognized in the decisions under the statute. Thus, whether the agreement between employer and employee relative to risks be express or implied, the latter cannot, it seems, be held to have assumed the risk from dangers resulting from conditions which arise or defects which come into existence, after the making of the contract, and which cannot be deemed to have been contemplated when the contract was made.³⁸

And again, risks that are apparent only to the eye of a skilled person or to one having unusual experience are not assumed by an employee who lacks that skill or that experience. Thus, where the driver of a coal team, who was injured by the breaking of the crank used to raise the body

³⁸ See *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 138 (1893).

But if, after the employment has begun, alterations are made which render the ways, works or machinery more dangerous, and the employee knowing the facts, continues in the service without objection on account of the additional risk to which he is subjected, his consent to the risk may be inferred. *Carrigan v. Washburn & Moen Manuf. Co.*, 170 Mass. 79 (1898).

In *Boucher v. Robeson Mills*, 182 Mass. 500 (1903), a workman in a cotton mill was injured by the breaking of a defective belt. The evidence tended to show that the superintendent used old belts, which often broke, in order to use them up, and did not put on new ones. It was held that the plaintiff did not assume the risk of the breaking of the belt. "The rule of law as to assumption of the risk does not apply where there is negligence on the part of the master in furnishing suitable instrumentalities for doing the work, and if the master has intrusted this duty to an agent, he is no less responsible."

Where a brakeman was ordered by the conductor to fix a defective coupling, which had to be fixed before the cars could be coupled, and then the conductor signalled to have the train pushed forward and the cars between which the brakeman was at work brought in contact without warning, the court held that the brakeman had the right to expect that the cars would not be brought together without warning while he was at work fixing the coupling, and that he could be found not to have accepted the risk that they should be so brought together. *Bowes v. New York, New Haven & Hartford Railroad*, 181 Mass. 89 (1902).

It was held in *Bourbonnais v. West Boylston Manuf. Co.*, 184 Mass. 250, 254 (1903), that "the fall of a staging which the jury could find had been furnished as a completed structure to be used in doing a certain work and then allowed by a superintendent to remain in place and be used as a means of doing other work cannot be held to be a transitory or passing risk of employment."

of the wagon when unloading coal, had noticed that at the weld where the crank broke there were two scarf's or seams, one on each side, it was held that since he was not possessed of the special skill necessary to determine that the crank was likely to break from defective welding, there was on his part no assumption of the risk of its breaking.³⁹

So also an employee cannot be held, as matter of law, to have assumed the risks arising from an unusual and unreasonable method of transacting the employer's business.⁴⁰ If, therefore, the evidence shows that there was a defect in the ways, works or machinery which was not the usual and obvious condition of things, and that such defect caused the injury, it becomes a question of fact for the jury whether the plaintiff was injured by an occurrence the risk of which he had assumed.⁴¹

In England it has been held that where a duty is imposed upon an employer by statute, the employee cannot assume the risk of his failure to perform that duty, and he is entitled to recover under this act, although he knew of the breach of the statutory duty on the part of the employer and continued at work in spite of that knowledge.⁴² The question involved

³⁹ *Murphy v. Marston Coal Co.*, 183 Mass. 385 (1903). And see *Lord v. Wakefield*, 185 Mass. 214 (1904).

In *Murphy v. Marston Coal Co.*, 183 Mass. 385, 387 (1903), the court says: "Under such conditions the defect must be considered latent, and in the absence of special skill and knowledge on the part of the plaintiff which would enable him from inspection to determine that it was unsafe, there was on his part no assumption of risk. In such a case it is only open and obvious dangers recognized as common to his employment, and which he may therefore be presumed to know from experience, that are assumed; and where the servant by his contract of employment does not engage to be possessed of such special skill as will enable him to determine, or by his knowledge and experience he cannot reasonably be called upon to ascertain, the defective character of the ways, works and machinery furnished him by the master, there is no assumption of risk by him."

⁴⁰ *Caron v. Boston & Albany Railroad*, 164 Mass. 523, 526 (1895); *Lynch v. Allyn*, 160 Mass. 248, 253 (1893).

⁴¹ *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202, 216 (1896); *Powers v. Fall River*, 168 Mass. 60 (1897); *Lynch v. Allyn*, 160 Mass. 248, 253 (1893). See also *Brouillette v. Conn. River Railroad*, 162 Mass. 198 (1894).

⁴² *Baddeley v. Earl Granville*, 19 Q. B. D. 423 (1887).

in that decision has not yet, however, been passed upon by the Massachusetts court.⁴³

§ 228. **The Assumption of Risk. Negligence of Superintendent or of a Person in Charge of a Signal, etc.**—At common law it is considered to be a part of the implied contract of service that the employee assumes the risk of the negligence of his fellow servants, of whom the superintendent is one.⁴⁴ The statute, however, has so far changed the common law relations of these two parties that the superintendent and the employee under him are not fellow servants in those cases within its terms; and hence, in such cases, there is no room for implying that term of the contract of service which the common law recognizes. It has, therefore, been uniformly held that an employee cannot, under the statute, assume the risk that the superintendent will do a negligent act which will result in his injury.⁴⁵ This rule is obviously the mere

⁴³ For statutes imposing certain duties upon employers, see Revised Laws, ch. 111, § 183, an act to provide for the blocking of railroad frogs, switches and guard rails. Revised Laws, ch. 111, §§ 201-205, an act to require locomotives and cars used in traffic within the Commonwealth to be equipped with certain safety appliances. Revised Laws, ch. 111, § 209, provides that "an employee of a railroad corporation who is injured by any locomotive, car or train which is used contrary to the provisions of sections two hundred and one and two hundred and three to two hundred and five, inclusive, shall not be considered to have assumed the risk of such injury, although he continues in the employment of such corporation after the unlawful use of such locomotive, car or train has been brought to his knowledge."

⁴⁴ *Farwell v. Boston & Worcester Railroad Corporation*, 4 Met. 49 (1842); *Moody v. Hamilton Manufacturing Co.*, 159 Mass. 70 (1893).

⁴⁵ *Malcolm v. Fuller*, 152 Mass. 160, 167 (1890); *Davis v. New York, New Haven, etc. Railroad*, 159 Mass. 532, 536 (1893); *Lynch v. Allyn*, 160 Mass. 248, 254 (1893); *Murphy v. City Coal Co.*, 172 Mass. 324 (1899), point 1; *Knight v. Overman Wheel Co.*, 174 Mass. 455, 461 (1899); *Murphy v. New York, New Haven & Hartford Railroad*, 187 Mass. 18, 20 (1904); *Meagher v. Crawford Laundry Machinery Co.*, 187 Mass. 586, 589 (1905). See *Tanner v. New York, New Haven & Hartford Railroad*, 180 Mass. 572 (1902).

In *Millard v. West End Street Railway*, 173 Mass. 512 (1899), it appeared that, before the plaintiff entered the defendant's employ, a pile of lumber had been erected under the supervision of the defendant's superintendent, in such a way that it was likely to fall; that it was intended to remain but a short time; that the plaintiff, a carpenter, although he had worked near the pile for two days, had not noticed it and knew

assertion in another form that the statute has, in such cases, abolished the defence of common employment.⁴⁶

These decisions still leave open the broader question whether or not an employee can, under the statute, voluntarily assume the risk of the negligence of a superintendent whom he knows to be incompetent and habitually careless.⁴⁷ Since that doctrine, commonly expressed by the maxim *volenti non fit injuria*, rests upon principles entirely distinct from those of the fellow-servant rule, and upon principles that the statute has not abolished, *quare*, whether this field is not still open for its application.

All of the above principles, and the *quare* as well, apply in like measure to cases involving the negligence of such a person as is described in the third clause of this section of the statute.

§ 229. The Application of the Maxim *Volenti non fit Injuria*.—The broader principle of the common law, expressed by the maxim *volenti non fit injuria*, applies also to cases under this statute, and with like effect as at common law. If, therefore, an employee is injured in consequence of defects in the condition of the ways, works or machinery that were known to him, the risk of which he understood and appreciated, and voluntarily encountered, he is debarred from recovering dam-

nothing about its condition; that the superintendent ordered the plaintiff to get up on the pile and to pry off a timber; that while he was so doing the pile fell and he was injured. The judge ordered a verdict for the defendant on the ground that the risk was obvious and the plaintiff assumed it when he entered the defendant's employ. The court held that "to say, as matter of law, that the plaintiff assumed the risk in this case is going further than the court has gone in this class of cases, and further than we think it ought to go. The danger in this case was owing wholly to an isolated act of carelessness on the part of the superintendent. This is not a danger which naturally grows out of the employment, or is necessarily incident to it."

"If an employee did, as incidental to his employment, assume the risk of injury from the negligence of the superintendent, "the superintendent would be a fellow servant as at common law, and one of the principal objects of the statute of 1887, ch. 270, § 1, cl. 2, abolishing this defence in actions under the act would be defeated." *Meagher v. Crawford Laundry Machinery Co.*, 187 Mass. 586, 589 (1905).

⁴⁶ See the common law case of *Hatt v. Nay*, 144 Mass. 186 (1887).

ages therefor in an action under the statute.⁴⁸ The peculiar field for the application of this principle is obviously to those cases where an injury results from dangers that do not come within the narrower doctrine of the assumption of risk,—dangers that arise after the service begins, as well as dangers in existence in the beginning.⁴⁹ But in order to make the rule applicable to any specific case, it is not enough to show mere knowledge of the existence of the danger: it must further appear that the risk was appreciated and voluntarily assumed.⁵⁰ Unless the circumstances are such as to make it perfectly clear that the whole risk was voluntarily encountered, the question is one of fact for the jury.⁵¹

"IF PERSONAL INJURY IS CAUSED TO AN EMPLOYEE, WHO, AT THE TIME OF THE INJURY, IS IN THE EXERCISE OF DUE CARE, BY REASON OF:"

§ 230. Who may sue under this Statute. Aliens.—Under this statute the right of action does not cease with the death of the injured employee, as is the rule at common law. This section is construed, therefore, as giving a right of action not alone to the injured employee himself, but also, in case of his death, to his legal representatives suing in his right.⁵² And the fact that his legal representatives happen to be non-resident aliens does not debar them from maintaining an action under its provisions.⁵³

§ 231. What a Plaintiff must show.—Whether the action be brought by the employee himself or by his legal representatives suing in his right, the burden rests upon the plaintiff clearly to bring his case within the statute. To do this he

⁴⁸ *Mellor v. Merchants' Manufacturing Co.*, 150 Mass. 362 (1890); *Lothrop v. Fitchburg Railroad*, 150 Mass. 423 (1890); *Thomas v. Quartermain*, 18 Q. B. D. 685 (1887); *Smith v. Baker*, [1891] A. C. 325.

⁴⁹ See *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155 (1891).

⁵⁰ *Thomas v. Quartermain*, 18 Q. B. D. 685 (1887); *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155 (1891).

⁵¹ *Mahoney v. Dore*, 155 Mass. 513, 518 (1892).

⁵² *Ramsdell v. New York & New England Railroad*, 151 Mass. 245, 250 (1890).

⁵³ *Mulhall v. Fallon*, 176 Mass. 266, 269 (1900); *Vetaloro v. Perkins*, 101 Fed. Rep. 393 (1900).

must show, in addition to due care, first, the existence of some defect in the ways, works or machinery due to negligence for which the employer is made responsible in the first clause, or the negligence of some one of those persons mentioned in the second or third clauses; and, second, that personal injury was caused thereby. Each of these points must of course be established: neither one without the other is sufficient to entitle a plaintiff to recover compensation under this statute.⁵⁴

§ 232. **The Requirement of Due Care.**—The provisions of this statute relative to care on the part of an employee introduce no new element into his right to recover compensation from his employer for personal injuries suffered in the course of his employment. The common law doctrine of contributory negligence is thereby expressly retained under the statute, and without modification.

Likewise the common law rule as to the burden of establishing the fact of due care, as that rule is interpreted by the Massachusetts court, applies to actions based upon the statute.⁵⁵ It rests, therefore, upon the person who seeks to maintain the action to show, either by positive affirmative testimony or by evidence from which the fact may legitimately be inferred, that the employee was at the time of the accident in the exercise of due care; and the establishment of this fact is a condition precedent to his recovery.⁵⁶

§ 233. **Some Rules of the Doctrine of Due Care applied under the Statute.**—It may be worth the while to note here some of the common principles of the law of due care that have been applied in actions based upon this statute.

⁵⁴ See *Felt v. Boston & Maine Railroad*, 161 Mass. 311 (1894).

⁵⁵ See opinion of Mr. Justice Webb in *Griffin v. Overman Wheel Co.*, 61 Fed. Rep. 568 (1894).

⁵⁶ *Lynch v. Boston & Albany Railroad*, 159 Mass. 536, 538 (1893); *Geyette v. Fitchburg Railroad*, 162 Mass. 549 (1895); *Flaherty v. Norwood Engineering Co.*, 172 Mass. 134 (1898); *Judge v. Elkins*, 183 Mass. 229 (1903); *Slade v. Beattie*, 186 Mass. 267 (1904).

"Where the defect is latent, reasonable care on the part of the servant does not call for an examination by him of the tools furnished by the master, to discover whether there may be latent defects." *Murphy v. Marston Coal Co.*, 183 Mass. 385, 388 (1903).

It has been held that due care on the part of an employee may be inferred as well from the absence of negligence, where there is a full disclosure of the facts of the case, as from positive acts of care.⁵⁷ Where the facts in the case, therefore, go to show that the employee was engaged in the performance of his duty, and there is nothing to show that he was careless, and the case is not one which makes it necessary to prove that he did a particular act by way of precaution, there is evidence from which the jury may properly find that he was in the exercise of due care.⁵⁸ But if the evidence fails to show that the employee was engaged in the performance of his duty, or to show what he was doing, when the accident happened, an inference of due care is not justified:⁵⁹ there is not in such a case a sufficient disclosure of the facts to furnish a basis upon which to form a proper inference. The rule is, of course, the same where there is nothing to show how the accident happened.⁶⁰ In each of these latter cases the question of due care is left wholly to conjecture.

And it has been held that where the case is one that requires the employee to do any act for his own protection, in order to satisfy the burden of proof on this subject it must appear affirmatively that he did that act.⁶¹ But it is not

⁵⁷ *Caron v. Boston & Albany Railroad*, 164 Mass. 523, 525 (1895).

Where the employee was killed by reason of a defect in a run used in unloading coal from a vessel, the court says: "It does not appear that he was guilty of any negligent act, and from this alone due care may be inferred. Being engaged upon his work in the usual way, and where he had a right to be, nothing further appearing, the jury would be justified in assuming that he was in the exercise of due care." *Garant v. Cashman*, 183 Mass. 13, 18 (1903).

⁵⁸ *Thyng v. Fitchburg Railroad*, 156 Mass. 13 (1892), as explained in *Geyette v. Fitchburg Railroad*, 162 Mass. 549, 551 (1895).

⁵⁹ *Irwin v. Alley*, 158 Mass. 249 (1893); *Tyndale v. Old Colony Railroad*, 156 Mass. 503, 505 (1892).

⁶⁰ *Dacey v. New York, etc. Railroad*, 168 Mass. 479 (1897).

⁶¹ *Lynch v. Boston & Albany Railroad*, 159 Mass. 536 (1893). See also *Davis v. New York, etc. Railroad*, 159 Mass. 532 (1893).

In *Morris v. Boston & Maine Railroad*, 184 Mass. 368 (1903), it appeared that the plaintiff, a section hand, was injured by a passing train while at work alone clearing snow from a switch after a heavy storm. It was held that he was guilty of contributory negligence in not watching for approaching trains. "By the nature of his employment a

necessary, it seems, to show in every such case that the employee took every possible precaution to protect himself: he has a right to trust, somewhat at least, to the superintendent to look out for his safety, in determining how and where he shall work;⁶² and this seems to be so even though all of the conditions are known to the employee.⁶³ Just how far this right to rely upon the superintendent extends is a difficult problem, toward the solution of which the cases afford little help.

The circumstances of a case may be such that the employee has a right to rely upon something in the ways or works to warn him of the approach of danger, especially where his duty requires him to give his whole attention in other directions. In such a case he has the right to assume that the ways or works are in such a condition as to give the proper warning, and is not negligent in acting upon that assumption.⁶⁴

"FIRST, A DEFECT IN THE CONDITION OF THE WAYS, WORKS OR MACHINERY CONNECTED WITH OR USED IN THE BUSINESS OF THE EMPLOYER, WHICH AROSE FROM, OR HAD NOT BEEN DISCOVERED OR REMEDIED IN CONSEQUENCE OF, THE NEGLIGENCE OF THE EMPLOYER OR OF A PERSON IN HIS SERVICE WHO HAD BEEN ENTRUSTED BY HIM WITH THE DUTY OF SEEING THAT THE WAYS, WORKS OR MACHINERY WERE IN PROPER CONDITION; OR,

§ 234. This Clause extends the Liability of Employers. — It was, at the time of the enactment of this statute, the common law rule, well settled in Massachusetts, that it was the duty of an employer to use reasonable care both in furnishing ways, works and machinery suitable for the carrying on of his business hand on a steam railroad must look out for passing trains, and such is the settled law of the Commonwealth." "It is also settled that the fact that the plaintiff had to bend over to do his work did not excuse him from using his eyes."

⁶² *Hennessy v. Boston*, 161 Mass. 502 (1894); *Mahoney v. New York, etc. Railroad*, 160 Mass. 573 (1894), *semble*.

⁶³ *Powers v. Fall River*, 168 Mass. 60 (1897).

⁶⁴ *Maher v. Boston & Albany Railroad*, 158 Mass. 36, 44 (1893).

It may be competent for the jury to find that a rule designed for the protection of the employees has been so constantly disregarded as to have been abandoned by the employer. *Boyle v. Columbia Fire Proofing Co.*, 182 Mass. 93, 98 (1902); *Brady v. New York, New Haven & Hartford Railroad*, 184 Mass. 225, 228 (1903).

The question of due care on the part of the employee has been discussed in various aspects in the numerous cases under the statute. For

ness, and also in keeping them in repair.⁶⁵ It was equally well settled that he could not wholly escape liability for a breach of those duties simply by delegating their performance to a competent servant.⁶⁶ While the rule upon this latter point was somewhat indefinite, it was pretty clear that the employer was not liable for the negligence of such a servant in all cases, but only where his negligence was of such a character as to show a failure on the part of the employer himself in the performance of his own duties.⁶⁷ There was, therefore, a considerable class of common law cases where the employee was injured by a defect in the ways, works or machinery, in which the fellow-servant doctrine still afforded a complete defence.⁶⁸ By sweeping away that defence in such cases,⁶⁹ it is apprehended that this clause has served, not merely to codify this branch of the common law of master and servant, but materially to extend the liability of employers.

"A DEFECT IN THE CONDITION"

§ 235. The Relation of the Defect to the Injury.—In order to recover under this clause of the statute the employee

such discussions see *Sullivan v. Old Colony Railroad*, 153 Mass. 118 (1891); *Thompson v. Boston & Maine Railroad*, 153 Mass. 391 (1891); *Gustafsen v. Washburn & Moen Manuf. Co.*, 153 Mass. 468, 474 (1891); *Shea v. Boston & Maine Railroad*, 154 Mass. 31 (1891); *Steffe v. Old Colony Railroad*, 156 Mass. 262 (1892); *Tyndale v. Same*, 156 Mass. 503 (1892); *Maher v. Boston & Albany Railroad*, 158 Mass. 36 (1893); *Shepard v. Boston & Maine Railroad*, 158 Mass. 174 (1893); *Davis v. New York, etc. Railroad*, 159 Mass. 532, 535 (1893); *Geyette v. Fitchburg Railroad*, 162 Mass. 549 (1895); *Mears v. Boston & Maine Railroad*, 163 Mass. 150 (1895); *Houlihan v. Connecticut River Railroad*, 164 Mass. 555 (1895); *Nihill v. New York, etc. Railroad*, 167 Mass. 52 (1896); *Dyer v. Fitchburg Railroad*, 170 Mass. 148 (1898); *Foss v. Old Colony Railroad*, 170 Mass. 168 (1898); *St. Jean v. Boston & Maine Railroad*, 170 Mass. 213 (1898); *Slade v. Beattie*, 186 Mass. 267 (1904).

⁶⁵ *Holden v. Fitchburg Railroad*, 129 Mass. 268 (1880), and cases cited.

⁶⁶ *Lawless v. Connecticut River Railroad*, 136 Mass. 1 (1883).

⁶⁷ *Rogers v. Ludlow Manufacturing Co.*, 144 Mass. 198 (1887); *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209 (1883); *Ford v. Fitchburg Railroad*, 110 Mass. 240, 259 (1872), and cases cited.

⁶⁸ *Johnson v. Boston Tow-Boat Co.*, 135 Mass. 209 (1883); *McGee v. Boston Cordage Co.*, 139 Mass. 445 (1885).

⁶⁹ See § 224.

must clearly show a defect in the condition of the ways, works or machinery, for the existence of which the employer is made responsible by its terms, and that such defect operated as a cause of the injury — it need not be the sole cause.⁷⁰ If, therefore, the cause of the accident appears upon all the evidence to be wholly conjectural, the action cannot be maintained and the case may be taken from the jury.⁷¹ And, furthermore, it must appear that the alleged defect was the direct or proximate cause of the injury. Hence it is not enough to show that there was a defect for the existence of which the employer was responsible, and that it had something to do with the accident: it must be shown also that it contributed thereto directly or proximately.⁷²

§ 236. What Defects come within this Clause. Temporary Defects. — Not every defect in the plant or appliances, though it be the legal cause of an injury to an employee, is a defect in the condition of the ways, works or machinery within the meaning of this clause. Legal consequences attach under the

⁷⁰ *Elmer v. Locke*, 135 Mass. 575 (1883).

The starting of a machine of itself is some evidence that it was in a defective condition. *Gregory v. American Thread Co.*, 187 Mass. 239, 242 (1905).

⁷¹ *Clare v. New York & New England Railroad*, 167 Mass. 39 (1896); *Murphy v. Boston & Albany Railroad*, 167 Mass. 64 (1896); *Donaldson v. New York, New Haven & Hartford Railroad*, 188 Mass. 484 (1905).

Where an employee was injured by the fall of an elevator-gate as he stepped from the car, it appeared that the gate, when thrown up, caught on an iron catch which held it up; that when it caught it gave a click; that at the time of the accident it was thrown up by another employee, gave the proper click and then fell without warning; that the gate worked properly shortly before the accident, and there was nothing to show why it acted badly at the time of the accident or that it was found to be defective on an examination made after the accident. It was held that the plaintiff had failed to show any negligence on the part of the defendant in not keeping its ways, works or machinery in order, and could not maintain his action. *Hill v. Iver Johnson Sporting Goods Co.*, 188 Mass. 75 (1905).

⁷² *Brady v. Ludlow Manufacturing Co.*, 154 Mass. 468 (1891).

Where an employee was injured by the starting of a machine of itself, after it had been stopped to be cleaned, by reason of a defect of which the foreman had knowledge and which he ought to have remedied, it was held that the injured employee might recover on the ground that there was a defect in the ways, works or machinery which caused the accident. *Lynch v. M. T. Stevens & Sons Co.*, 187 Mass. 397 (1905).

statute, as at common law, only to those defects in the ways, works or machinery to guard against which a duty rests upon the employer. If there be any defects of such a nature that the law does not hold an employer bound to guard against them, he is not liable under this clause for injuries due to them. It has been held, therefore, that since in general no obligation rests upon him relative to temporary defects that arise from common and short-lived causes, such faulty conditions do not constitute defects within this clause. Thus the dampness of moulds in a foundry, which caused an explosion of the melted metal that was poured into them, is not a defect within the meaning of this part of the statute.⁷³

§ 237. The Presence of Extraneous Substances as a Defect in the Ways or Works.— Objects lying upon the ways or works, which do not alter their fitness for the purpose for which they are generally used, are not defects in the ways or works within the meaning of this clause.⁷⁴ It has been held, thus, that the mere presence of rubbish upon the floor of a house in the process of construction was not such a defect.⁷⁵ So also that a stone which was left upon a staging, said staging being in no way defective, and which fell off and caused the injury, was not such a defect.⁷⁶

§ 238. The Failure to supply Safety Contrivances as a Defect in the Ways, Works or Machinery.— It is not the duty

⁷³ Whittaker v. Bent, 167 Mass. 588 (1897). See also McCann v. Kennedy, 167 Mass. 23 (1896).

“There are many transitory risks of which it is impracticable to require an employer to give notice to his men, although no doubt, if the risk is very great and unusual, the fact that it is short-lived is not always an excuse.” Thompson v. Norman Paper Company, 169 Mass. 416 (1897).

A rotten belt in use in a cotton mill may constitute a defect in the condition of the ways, works or machinery. Boucher v. Robeson Mills, 182 Mass. 500, 502 (1903). And so an unsafe run used in unloading coal from a vessel may be a defect in the condition of the ways, works or machinery. Garant v. Cashman, 183 Mass. 13, 15 (1903). But a pile of boards in a lumber yard, some of which are longer than others, does not constitute such a defect. Campbell v. Dearborn, 175 Mass. 183, 185 (1900).

⁷⁴ McGriffen v. Palmer’s Shipbuilding Co., 10 Q. B. D. 5 (1882).

⁷⁵ O’Connor v. Neal, 153 Mass. 281 (1891).

⁷⁶ Carroll v. Wilcutt, 163 Mass. 221 (1895).

of an employer to furnish the latest and best machinery: he is only bound to see that that which he does furnish is safe and suitable.⁷⁷ If, therefore, it appears upon the evidence that a machine is not in itself defective, but is in the same condition at the time of the accident as it was when the plaintiff entered the defendant's employ, the mere fact that certain contrivances which would have rendered the machine more safe, had not been put upon it, does not constitute a defect in the condition of the ways, works or machinery within the meaning of this clause.⁷⁸

§ 239. The Negligent Use or Improper Adjustment of Safe Appliances as a Defect in the Ways, Works or Machinery. — The negligent use, by a fellow employee, of a proper and safe appliance does not constitute a defect in the condition of the ways, works or machinery within the meaning of this clause of the statute.⁷⁹

Likewise the failure of the employees properly to adjust a safe instrumentality, which requires temporary adjustment from time to time in the course of the work, sufficient means for such adjustment being supplied by the employer, is not a defect in the condition of the ways, works or machinery within this clause of the statute.⁸⁰ "If the employer leaves such a matter to the workmen, furnishing them with the means of making the instrumentality safe, his duty to his employees is performed."⁸¹ Thus, the omission of the workmen to fasten down a skid used in moving freight from one car to another, it being the practice to fasten the skid but the act of

⁷⁷ *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 137 (1893), *semble*; *Wood, Master and Servant*, page 688.

⁷⁸ *Ross v. Pearson Cordage Co.*, 164 Mass. 257 (1895); *O'Connor v. Whittall*, 169 Mass. 563 (1897).

Evidence, therefore, that the arrangement of the machinery is different from that usually made in other like establishments is not admissible. *French v. Columbia Spinning Co.*, 169 Mass. 531 (1897).

⁷⁹ *Ashley v. Hart*, 147 Mass. 573, 575 (1888); *Conner v. Draper Company*, 182 Mass. 184, 187 (1902).

⁸⁰ *O'Keefe v. Brownell*, 156 Mass. 131 (1892); *Hayes v. New York, New Haven & Hartford Railroad*, 187 Mass. 182 (1905).

⁸¹ *Hayes v. New York, New Haven & Hartford Railroad*, 187 Mass. 182 (1905).

fastening it being left to the workmen, who were furnished with sufficient materials for the purpose, is not such a defect as will enable an employee who is injured by the slipping of the skid to maintain an action under this clause.⁸¹

§ 240. The Unsuitableness of Safe Appliances as a Defect in the Ways, Works or Machinery. — In order to show a defect in the condition of the ways, works or machinery within the meaning of this clause of the statute, the plaintiff is not necessarily required to prove that some appliance was out of order. “An unsuitableness of ways, works, or machinery for work intended to be done and actually done by means of them, is a defect within the meaning of statute 1887, ch. 270, § 1, cl. 1, although the ways, works, or machinery are perfect of their kind, in good repair, and suitable for some work done in the employer’s business other than the work in doing which their unsuitableness causes injury to the workmen.”⁸² Under this rule an appliance that was perfect and suited to the work to which it was put at the time when it was purchased, may, by reason of its long use and the greater strain put upon it because of the growth of the business in which it is used, become in time unsuitable for that same use, and constitute a defect in the condition of the ways, works or machinery within the above rule.⁸³

Such cases are to be distinguished, of course, from those where the employer has furnished a supply of proper appliances for the work to be done, but the employee failed to select and use such as were fitted for the purpose. In these latter cases it is the settled rule that there is no defect for which the employer can be held liable under this statute.⁸⁴

§ 241. A Dangerous Method of carrying on Business as a Defect in the Ways, Works or Machinery. — It has not as yet been decided in this Commonwealth whether a dangerous method of carrying on the employer’s business constitutes

⁸¹ *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202, 217 (1896).
Heske v. Samuelson, 12 Q. B. D. 30 (1883), accord.

⁸² *Gunn v. New York, etc. Railroad*, 171 Mass. 417 (1898).

⁸³ *Allen v. Smith Iron Co.*, 160 Mass. 557 (1894); *Thyng v. Fitchburg Railroad*, 156 Mass. 13 (1892); *Trimble v. Whitin Machine Works*, 172 Mass. 150 (1898).

a defect in the condition of the ways, works or machinery within the meaning of this clause. The courts in England have, however, passed upon the point, taking an affirmative view of the matter.⁸⁵ But the question is not one of primary importance, since a prior question must be decided before it can arise, namely, Did not the employee assume the risks incident to such dangerous method? He will be held to have done so where it does not appear that any change had been made in the mode of doing the business, so as to make it more dangerous, after he entered upon the employment.⁸⁶

§ 242. The Effect of a Variance between Declaration and Proof as to the Character of the Defect. — A variance between the declaration and the proof as to the character of the defect is not fatal, at least in cases where the precise nature of the defect is peculiarly within the knowledge of the defendant, provided the declaration correctly points out its general nature.⁸⁷

§ 243. Meaning of the Phrase "in the Condition." — The phrase "defect in the condition of the ways, works or machinery," it may be observed, is of somewhat broader significance than is the shorter phrase, "defect in the ways, works or machinery." This fact is recognized by the courts,⁸⁸ and opens the way to a liberal construction of the words themselves. The emphasis is placed upon "the condition," — the condition relative to the employee, — and accordingly it is held that the words do not refer to working capacity, but to the condition with regard to the safety of the employees.⁸⁹

"OF THE WAYS, WORKS OR MACHINERY"

§ 244. Paths necessarily used as a Part of the Ways or Works. — It has not as yet been directly decided by the Massachusetts court whether a path that an employee ordinarily

⁸⁵ Smith *v.* Baker, [1891] A. C. 325.

⁸⁶ Caron *v.* Boston & Albany Railroad, 164 Mass. 523, 530 (1895).

⁸⁷ Willey *v.* Boston Electric Light Co., 168 Mass. 40 (1897).

⁸⁸ McGriffen *v.* Palmer's Shipbuilding Co., 10 Q. B. D. 5 (1882); Willey *v.* Boston Electric Light Co., 168 Mass. 40, 42 (1897).

⁸⁹ Willey *v.* Boston Electric Light Co., 168 Mass. 40 (1897).

takes in order to pass from one part of the shop to another, which passing back and forth is required by the exigencies of his employment, is a part of the ways or works of the employer within the meaning of this clause. In *Dolphin v. Plumley*⁹⁰ the court seems to intimate that the answer to the question would be in the affirmative. This would be in accordance with the English view.⁹¹

§ 245. **Explosives as a Part of the Ways or Works.**—An article which is bought by the employer for a specific use and is instantly consumed in that use, as dynamite used for blasting, is not itself a part of the employer's ways or works.⁹² Nor, having failed properly to explode when the blast was set off, does it become a defect therein so that an employee, injured by its subsequent explosion while trying to remove the charge, can recover under this clause.⁹³ As was said by Mr. Justice Knowlton, speaking in a recent case⁹⁴ of a cartridge which had remained undischarged after the blast had exploded: "This was merely a condition of the material upon which the employees were working, caused by their work, and necessarily incident to the business in which they were engaged. It was in no proper sense a defect in the ways, works, or machinery of the defendant."

§ 246. **Partially Completed and Temporary Structures as a Part of the Ways, Works or Machinery.**—The English courts have held distinctly that this clause does not apply to partly made ways or works upon the employer's premises,⁹⁵ as the partially constructed walls of a warehouse which was being built upon the employer's land to be used when completed

⁹⁰ 167 Mass. 167 (1896).

⁹¹ *Willette v. Hart*, [1892] 2 Q. B. 92.

In *Donovan v. American Linen Co.*, 180 Mass. 127 (1901), it was held that an employee assumed the risk of slipping as she passed down the alley of the weave room on her way out of the mill after work at night, the slipping being due to the defendant's failure to furnish light.

⁹² *Shea v. Wellington*, 163 Mass. 364, 369 (1895).

⁹³ *Welch v. Grace*, 167 Mass. 590, 592 (1897).

An experienced quarryman assumes the risk incident to drilling out an unexploded blast. *Allard v. Hildreth*, 173 Mass. 26 (1899).

⁹⁴ *Welch v. Grace*, 167 Mass. 590, 592 (1897).

⁹⁵ *Howe v. Finch*, 17 Q. B. D. 187 (1886).

in his business. This decision is placed upon the ground that the scope of the clause is limited to ways or works actually connected with, or actually used in, the business of the employer; which principle, fairly applied, must exclude incomplete structures.⁹⁶

Upon this same ground the Massachusetts court has held that this clause of the statute does not apply to temporary structures constructed on the premises of third persons, as a staging built up as the work progressed by masons who were engaged in putting up a building;⁹⁷ or a staging used in painting a building.⁹⁸ The rule in these cases has been applied also to ladders that were supplied by the employer, but were fastened together by the workmen themselves and by them placed against the house of a third person, which they were engaged in painting.⁹⁹

⁹⁶ So it has been held that a building in the process of construction upon the premises of a third person was not a part of the ways, works or machinery of the sub-contractor who was helping to build it. *Beique v. Hosmer*, 169 Mass. 541 (1897).

⁹⁷ *Burns v. Washburn*, 160 Mass. 457 (1894); *Reynolds v. Barnard*, 168 Mass. 226 (1897).

⁹⁸ *Adasken v. Gilbert*, 165 Mass. 443, 445 (1896).

This rule has been applied to three planks, laid side by side and used as a bridge to connect two walls in an unfinished building which was being erected on the employer's premises. "They were used merely for a temporary purpose." *Morris v. Walworth Manufacturing Co.*, 181 Mass. 326 (1902).

"An employer can leave to his employees the erection of stagings which are used temporarily in the course of the work. If he elects to do so and furnishes them with proper materials, and is not negligent in the selection of his employees, he is not liable." *Rapson v. Leighton*, 187 Mass. 432 (1905). And an employer owes his employees no duty to inspect either when he orders the construction of a new staging by workmen whom he supplies with proper materials for the work, or when he orders the moving of one already constructed. He may properly in both cases trust the work to the employees. *White v. Unwin*, 188 Mass. 490 (1905).

⁹⁹ *McKay v. Hand*, 168 Mass. 270 (1897).

In *Higgins v. Higgins*, 188 Mass. 113 (1905), it was held that while an extension ladder might be found by the jury to be a part of the ways, works, and machinery of an employer engaged in the business of repairing roofs, yet when it became unfit for use as such and its two parts were tied together with a rope by the workmen who were using it, as if two separate ladders had been made into one, "this makeshift was not a part of the ways, works or machinery of the defendant."

The cases within this rule are of course to be distinguished from those where there is a defect in the staging or like temporary structure owing to the negligence of a superintendent. In the latter class of cases, although the defective structure may not be a part of his ways, works or machinery, the employer may be liable under the second clause of this statute.¹⁰⁰

The case of *Prendible v. Connecticut River Manufacturing Company*¹⁰¹ presents an apparent exception to the settled rule which excludes temporary structures from the ways, works or machinery of an employer, but it is apparent only. In the Prendible case the staging, by the fall of which the employee was injured, was about twenty feet long by five feet wide, made in permanent form, and so constructed that it could be moved bodily from place to place about the employer's premises, a woodyard, as the work required. Because it was a permanent, though movable, structure and was intended to be used in each place where it was erected for a considerable time, the court held that it was a part of the defendant's ways, works or machinery.¹⁰² And plainly it was as much a part

¹⁰⁰ *Solari v. Clark*, 187 Mass. 229 (1905). Where it appeared that the superintendent had charge of the construction of a staging used in the erection of a large chimney and was negligent in not seeing that it was properly put together and secured. *Rapson v. Leighton*, 187 Mass. 432 (1905), where it appeared that the superintendent interfered with the construction of the staging by the workmen and directed them to use a certain ledger board, which turned out to be defective, without inspecting it to see if it was safe. Where the construction or moving of temporary stagings is left to the employees and sufficient materials for the work are supplied, the failure of the superintendent to inspect them before they are used is not negligence on his part. *White v. Unwin*, 188 Mass. 490 (1905).

¹⁰¹ 160 Mass. 131 (1893).

¹⁰² In *McMahon v. McHale*, 174 Mass. 320 (1899), this rule was applied to a derrick erected in a stone yard for the purpose of moving blocks of granite from the cars and placing them conveniently to be cut, and of reloading the cut stones. This use of the derrick, it appeared, though temporary, had continued four weeks when it fell upon a stone-cutter who was expected to work near it but who had nothing to do with its management. In the course of the opinion the court says: "For the time being, and with respect to workmen employed in cutting stone near it, the derrick was a piece of machinery, part of the fitting up of a stone-yard, as the stage used in building piles of wood was part of the fitting up of a wood yard in *Prendible v. Connecticut River Lumber Co.*, 160

of the permanent works of the employer as the defective truck in *Geloneck v. Dean Steam Pump Company*,¹⁰³ or any similar appliance.

"CONNECTED WITH OR USED IN THE BUSINESS OF THE EMPLOYER,"

§ 247. The Defective Ways, Works or Machinery must be a Part of the Employer's Permanent Plant.— This provision of the statute limits the liability of employers to such ways, works and machinery as have become a "part of the permanent structure or plant."¹⁰⁴ Physical annexation is necessary to satisfy this rule wherever an appliance requires such annexation in order to be in a position to do its work. Hence it has been held that a casting which a workman was engaged in fitting to the gate of an elevator well and which fell down the well before it could be fastened in place had not become a part of the ways, works and machinery within the meaning of this clause.¹⁰⁴

Provided an appliance or structure satisfies this rule in other respects, it does not matter for how short a time it has been a part of the permanent plant.¹⁰⁵ It has been held accordingly that an employer may be liable for injuries due to a defect in such an appliance or structure, even though it has been a part of his ways, works or machinery for but a single day.¹⁰⁵

§ 248. The Defective Ways, Works or Machinery must be under the Employer's Control and be used by his Authority.— The question of the ownership of the ways, works or machinery in any given instance affords little, if any, direct aid in determining whether or not they have become "connected with or used in the business of the employer" within

Mass. 131, 139, rather than an appliance to be put together and set up and moved from place to place by workmen who were using it, as was the derrick in *McGinty v. Athol Reservoir Co.*, 155 Mass. 183, 187."

¹⁰³ 165 Mass. 202 (1896).

¹⁰⁴ *Nye v. Dutton*, 187 Mass. 549 (1905). "An appliance does not become a part of the ways, works and machinery until it becomes a part of the permanent structure or plant."

¹⁰⁵ *Copithorne v. Hardy*, 173 Mass. 400 (1899).

the meaning of the rule stated in the preceding section.¹⁰⁶ There are, however, two essential elements found in every case within this clause of the statute, which furnish a decisive test upon the point. Thus, in order to bring his case within the rule, a plaintiff must show, first, that the defect was in ways, works or machinery which the employer had expressly or impliedly authorized his employees to use in carrying on his business; and, second, that the employer had control over those ways, works or machinery.¹⁰⁷ The test was stated by Mr. Justice Morton in *Trask v. Old Colony Railroad*,¹⁰⁸ as follows: "It may not be necessary, in order to render an employer liable for an injury occurring to an employee through a defect in the ways, works, or machinery, that they should belong to him, but it should at least appear that he has the control of them, and that they are used in his business, by his authority, express or implied."

§ 249. **The General Application of the Test.** — Both of the elements above referred to must coexist — the absence of either is fatal. Therefore, if it appears that the employer has no control over the ways, works or machinery, although he expressly or impliedly authorized their use, they are not ways, works or machinery connected with or used in his business within the meaning of this clause. It has been held upon this ground that an employer was not liable under the statute for an injury resulting to his employee from a defect in a track owned and controlled by another company, which connected with its own,¹⁰⁹ even though the defect was at the very point of connection;¹¹⁰ nor, again, for a defect in the premises of a third person, where he had sent his employee to work.¹¹¹ In *Engel v. New York, etc. Rail-*

¹⁰⁶ *Coffee v. New York, New Haven & Hartford Railroad*, 155 Mass. 21, 23 (1891); *Bowers v. Connecticut River Railroad*, 162 Mass. 312 (1894).

¹⁰⁷ *Trask v. Old Colony Railroad*, 156 Mass. 298 (1892).

¹⁰⁸ 156 Mass. 298 (1892), at page 303.

¹⁰⁹ *Engel v. New York, Providence & Boston Railroad*, 160 Mass. 260 (1893).

¹¹⁰ *Trask v. Old Colony Railroad*, 156 Mass. 298 (1892).

¹¹¹ *Regan v. Donovan*, 159 Mass. 1, 3 (1891); *Riley v. Tucker*, 179 Mass. 190 (1901). In this last case it appeared that the plaintiff, a plumber's helper, had been employed by the defendant in putting in the

road,¹¹² the court says upon this point: "Neither the language of the statute nor good sense would permit us to hold an employer liable under the act for defects which he cannot help, in a place out of his control, to which his employees once in a while may be called for a few minutes."

So, also, on the other hand, if it appears that the article was used without the authority of the employer, although it was under his control, the case does not come within the clause. Thus it has been held that an employer was not liable under the statute for an injury occurring to an employee by reason of a defect in a ladder which had been borrowed without the knowledge of the employer and brought upon his premises, and was being used in his business without his authority.¹¹³

§ 250. **The Application of the Test to Foreign Cars.** — It is the accepted construction that cars coming from, and owned by, other railroads, which are to be hauled over the defendant's road, in the due course of its business, for the transportation of the freight contained therein, are a part of its ways, works or machinery within the meaning of this clause.¹¹⁴ In the application of this rule, however, a distinction was made in the case of a car which had delivered its freight and had been returned to the yard at the defendant's terminus, where, having been shunted off from the rest of the train, it plumbing in a new building in the process of construction; that access from floor to floor was had by means of stagings and ladders; that the defendant did not construct these means of access, nor manage nor control them. It was held that the stagings and ladders did not form a part of the defendant's ways or works. "He had no power to remedy a defect if he had discovered it."

In *Hyde v. Booth*, 188 Mass. 290 (1905), it was held that the hatch of a vessel was no part of the ways, works or machinery of the stevedore who was engaged in unloading it.

¹¹² 160 Mass. 260 (1893), at page 261.

¹¹³ *Jones v. Burford*, 1 Times Law Reports, 137 (1884).

¹¹⁴ *Bowers v. Connecticut River Railroad*, 162 Mass. 312 (1894).

In *Foster v. New York, New Haven & Hartford Railroad*, 187 Mass. 21 (1904), it was held that a car of another railroad, when taken and utilized by the defendant solely for the purpose of unloading freight, as for a passageway between the car it was unloading and the platform of its freight depot, became for the time being a part of its ways, works or machinery.

was running by itself, when the accident happened, to a position where it could be re-delivered to its owner.¹¹⁵ Such an isolated, empty car, it was held, could not fairly be considered to be an appliance furnished by the employer for the carrying on of its business. The provisions of the amendment of 1893,¹¹⁶ which are now a part of this section of the statute, would seem to have sufficiently broadened the rule of construction to eliminate this distinction.

"WHICH AROSE FROM,"

§ 251. The Effect of this Provision. — These words place no new or additional burden upon the employee. He must show under the statute, as at common law, that the defect which caused the injury owed its existence to the breach of a duty on the part of the employer, — to the breach of a duty owed to himself. But the act has extended the duties of employers, and has thus, of course, made possible new breaches of duty, of which an employee may avail himself.¹¹⁷

"OR HAD NOT BEEN DISCOVERED OR REMEDIED IN CONSEQUENCE OF,"

§ 252. Discovered or Remedied. — The mere fact that there was a defect in the condition of the ways, works or machinery connected with or used in the business of the employer, and that such defect was the legal cause of an injury to his employee, is not enough, by reason of the requirements of this provision, to fix the liability under this clause of the statute. It must appear further that the defect was of such a nature that the employer or the person entrusted by him with that duty might have discovered and removed it. Moreover, although the word "or" is used in the provision, — "dis-

¹¹⁵ *Coffee v. New York, New Haven & Hartford Railroad*, 155 Mass. 21 (1891).

¹¹⁶ These provisions read: "A car which is in use by, or which is in possession of, a railroad corporation shall be considered as a part of the ways, works or machinery of the corporation which uses or has it in possession, within the meaning of clause one of this section, whether it is owned by such corporation or by some other company or person."

¹¹⁷ *McPhee v. Scully*, 163 Mass. 216 (1895).

covered or remedied," — evidence going to show that the employer might have discovered the dangerous condition will not sustain the burden of proof upon this point, if it also appears that he had not the right to remedy it.¹¹⁸ The power to discover and the right to remedy must be shown to have coexisted.

§ 253. The Meaning of the Word "Remedied." — This word as here used is given a liberal, and at the same time somewhat unusual, meaning. The object of the clause is obviously to impose a liability where an injury results from a danger that might have been removed, but was not, owing to negligence. This consideration furnishes the key to the interpretation that has been adopted. Remedied "does not mean that the machine must have been made perfect for working purposes, but that its dangerous condition must have been ended." Any device, whether of a temporary or a permanent nature, that will bring about such a result, will satisfy this meaning.¹¹⁹

"THE NEGLIGENCE OF THE EMPLOYER"

§ 254. The Duty of the Employer to furnish and maintain Safe Ways, Works and Machinery. — This provision of the statute makes no change in the common law duties of employers: whatever was negligence on the part of the employer at common law, is negligence on the part of the employer under this statute. He is bound, therefore, to use reasonable care both in furnishing ways, works and machinery safe and suitable for the work to be done, and in keeping them in proper condition.¹²⁰ If he has done this much, he is

¹¹⁸ *Engel v. New York, Providence & Boston Railroad*, 160 Mass. 260 (1893). "These words mean that the defect must be one which the employer has a right to remedy if he does discover it, and of a kind which it is possible to charge a servant with the duty of setting right."

¹¹⁹ *Willey v. Boston Electric Light Co.*, 168 Mass. 40, 42 (1897).

¹²⁰ *Holden v. Fitchburg Railroad*, 129 Mass. 268 (1880), and cases cited.

"The rule of law as to assumption of the risk does not apply where there is negligence on the part of the master in furnishing suitable instrumentalities for doing the work, and if the master has intrusted this

not responsible to his employees under this provision of the statute.¹²¹

This duty has, however, certain recognized limits: it is not every failure to provide safe structures and appliances or to keep them in proper order that will render an employer liable under this clause.¹²² Thus "the absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short lived causes," such, for instance, as the dampness of moulds used in a foundry.¹²³ And again, this duty does not require the employer to adopt the latest improvements in machinery,¹²⁴ nor to make use of new contrivances, even though, if adopted, they would render his ways, works or machinery more safe.¹²⁵ Moreover, when he has once furnished safe and proper appliances for the conduct of his business, he is under no obligation to see that they are used, and consequently is not responsible in damages to an employee who is injured through a failure to use them.¹²⁶

§ 255. **The Duty of the Employer relative to Inspection.** — An employer is bound to use reasonable care and diligence in order to discover any defects that may exist in his ways, works or machinery: he is not an insurer of their condition,

duty to an agent, he is no less responsible." *Boucher v. Robeson Mills*, 182 Mass. 500, 502 (1903).

¹²¹ *Hill v. Iver Johnson Sporting Goods Co.*, 188 Mass. 75 (1905).

¹²² *McCann v. Kennedy*, 167 Mass. 23 (1896); *Whittaker v. Bent*, 167 Mass. 588 (1897).

¹²³ *Whittaker v. Bent*, 167 Mass. 588, 589 (1897).

¹²⁴ See *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 137 (1893).

¹²⁵ *Ross v. Pearson Cordage Co.*, 164 Mass. 257 (1895); *Gleason v. New York, etc. Railroad*, 159 Mass. 68 (1893), *semble*; *Fisk v. Fitchburg Railroad*, 158 Mass. 238 (1893), *semble*.

¹²⁶ *Allen v. Smith Iron Co.*, 160 Mass. 557 (1894).

Where the safety of employees depends upon the temporary adjustment of instrumentalities, such as skids, in the course of the work upon which they are engaged, "if the employer leaves such a matter to the workmen, furnishing them with the means of making the instrumentality safe, his duty to his employees is performed." *Hayes v. New York, New Haven & Hartford Railroad*, 187 Mass. 182 (1905). The rule is the same as to temporary stagings, and he is not bound to inspect them before they are used. *White v. Unwin*, 188 Mass. 490 (1905).

and cannot be held responsible for hidden defects in them that could not be discovered by the most careful inspection.¹²⁷ This common law rule is expressly retained under the statute; the employer is made liable by its terms only for defects that "had not been discovered or remedied" by reason of his negligence. He is not, therefore, liable in an action based upon the statute for defects in the original construction of ways, works or machinery which belong to third parties but which become temporarily a part of his ways, works or machinery, as cars received from other railroads, provided he has used reasonable care to inspect them and to discover the defects.¹²⁸

In this connection it is to be remembered that the negligence of the car inspector is, under the statute, the negligence of the employer, since he is the person entrusted by the latter with the performance of this duty.

¹²⁷ *Ladd v. New Bedford Railroad Co.*, 119 Mass. 412 (1876), point 1, and cases cited. *Spicer v. South Boston Iron Co.*, 138 Mass. 426 (1885).

"Where the defect is latent, reasonable care on the part of the servant does not call for an examination by him of the tools furnished by the master, to discover whether there may be latent defects; while it is incumbent on the master to use reasonable care by inspection to discover such defects." *Murphy v. Marston Coal Co.*, 183 Mass. 385, 388 (1903).

In *Harris v. Putnam Machine Co.*, 188 Mass. 85 (1905), it was held that where a moulder who had general charge of the foundry work but was not a machinist, was killed by the giving way of a fixed crane because of the breaking of two bolts, which bolts had been in use for fifteen years, had at times been loose and subjected to some shock and had become crystallized, the load at the time of the accident being no heavier than usual, it was a question for the jury whether the failure to examine the bolts or to replace them by new ones was negligence on the part of the defendant.

¹²⁸ *Thyng v. Fitchburg Railroad*, 156 Mass. 13 (1892).

Likewise, it is the employer's duty, when he sets an employee to work in a place of danger, to give him such notice and instruction as may reasonably be necessary, taking into consideration the youth, inexperience or want of capacity of the employee; and if he fails so to do, he is responsible for the injury suffered in consequence of such neglect. *Atkins v. Merrick Thread Co.*, 142 Mass. 431 (1886); and see also, *Sullivan v. India Manufacturing Co.*, 113 Mass. 396 (1873).

"OR OF A PERSON IN HIS SERVICE WHO HAD BEEN ENTRUSTED BY HIM WITH THE DUTY OF SEEING THAT THE WAYS, WORKS OR MACHINERY WERE IN PROPER CONDITION;"

§ 256. This Provision enlarges the Common Law Rule of Liability. — The plain result of this provision of the statute is an extension of the common law liability of employers. This result the statute brings about by making the employer stand in the shoes of the employee whom he has charged with the performance of the particular duty here specified. In other words, a right of action which at common law existed only against the negligent employee is turned against the employer. This operation of the clause, it may be observed, does not extend beyond those cases that fairly come within the terms of this provision.¹²⁹ Only the negligence of the particular employees charged therewith, occurring in the course of the performance of the single duty of seeing that the ways, works or machinery were in proper condition, is made the negligence of the employer; all other classes of negligent acts of which employees may be guilty are left on the old common law footing. Thus no action can be maintained under this clause for an injury due to the negligence of a fellow employee in using appliances that were in proper condition.¹³⁰

§ 257. A Person entrusted. — This provision of the statute is silent as to the grade of the employee who may be entrusted with the duty of seeing that the ways, works or machinery were in proper condition. Whether it be inferior or superior to that of the injured employee seems, therefore, to be wholly immaterial. Moreover, there is nothing in the wording of the provision to require the construction that the duty of seeing that the ways, works or machinery were in proper condition should be his sole duty; it may well be only a part, even a

¹²⁹ See §§ 224 and 234, *ante*.

¹³⁰ *Ashley v. Hart*, 147 Mass. 573 (1888).

For suggestions as to the form of declarations under this first clause, see *Conroy v. Clinton*, 158 Mass. 318 (1893); *Bowers v. Connecticut River Railroad*, 162 Mass. 312 (1894).

very small part, of his duty. But the essential thing is that the employee should be entrusted by the employer with the performance of this particular duty — should be a person selected to hold this position of responsibility.¹³¹

"SECOND, THE NEGLIGENCE OF A PERSON IN THE SERVICE OF THE EMPLOYER WHO WAS ENTRUSTED WITH AND WAS EXERCISING SUPERINTENDENCE AND WHOSE SOLE OR PRINCIPAL DUTY WAS THAT OF SUPERINTENDENCE, OR, IN THE ABSENCE OF SUCH SUPERINTENDENT, OF A PERSON ACTING AS SUPERINTENDENT WITH THE AUTHORITY OR CONSENT OF SUCH EMPLOYER; OR,"

§ 258. This Clause further extends the Liability of Employers. — The duty of an employer relative to superintendence, at common law, is simply to select and retain in his service a man competent to oversee his work. He is bound to exercise due care and diligence in making such selection and retention, but with that his common law obligation ceases; he is not an insurer of the competence of the man so selected and retained.¹³² The sole ground of common law liability in this direction, therefore, is a failure to use reasonable care and diligence in these two particulars; since the superintendent and the employee under him are fellow servants,¹³³ the doctrine of common employment relieved the employer from all legal responsibility to his employees for the superintendent's negligent acts.¹³⁴

The provisions of this second clause of the section have revolutionized this branch of the common law of master and servant, in the cases to which they apply. The obvious purpose was to prevent the employer from freeing himself from all further liability by appointing a competent man to take

¹³¹ In *Copithorne v. Hardy*, 173 Mass. 400 (1899), where the plaintiff was injured by the fall of certain shafting, it was held that the carpenter who put up the shafting, though acting under the orders of the superintendent, was the "person entrusted" within the meaning of the statute.

¹³² *Tarrant v. Webb*, 18 C. B. 797.

¹³³ See *Rogers v. Ludlow Manufacturing Co.*, 144 Mass. 198, 203 (1887).

¹³⁴ *Zeigler v. Day*, 123 Mass. 152 (1877); *Floyd v. Sugden*, 134 Mass. 563 (1883).

charge of his business.¹³⁵ This purpose is accomplished, as was the case with the preceding clause, by making the employer directly liable for the negligent acts of the person entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, thus incidentally abolishing the fundamental principle upon which his immunity at common law in such cases rested. The net result of the operation of the clause is, then, that the superintendent is no longer to be regarded as the fellow servant of the employees under him, in those cases that come within the statute, but as the personal representative of the employer, who stands in his place and performs his duties.

§ 259. The Limits to the Operation of the Clause. Passing Dangers. Warnings.—There are certain limits to the general scope of this clause that are fairly well defined. The law recognizes that every employer owes to his employees certain duties, upon the performance of which their safety very largely depends. He is bound to take all of those ordinary and usual precautions that common experience has shown to be necessary in order to protect them from the common dangers of their employment, but he is not required to go further, either personally or by his superintendent. It can, therefore, be laid down as a general proposition that an employer is not liable under this clause for the consequences of a negligent act of his superintendent, though such act may properly be in its character an act of superintendence, as to matters outside the scope of his duties toward his employees, unless it clearly appears that he has undertaken to do by his superintendent that which he was not called upon to do.¹³⁶

It has been held, thus, that since no duty rests upon the employer to inspect the exploders used in blasting in his quarries, he is not liable under this clause if his superin-

¹³⁵ *Malcolm v. Fuller*, 152 Mass. 160, 165 (1890).

¹³⁶ *Shea v. Wellington*, 163 Mass. 364, 370 (1895); *McCann v. Kennedy*, 167 Mass. 23 (1896); *Burns v. Washburn*, 160 Mass. 457, 458 (1894); *Fitzgerald v. Boston & Albany Railroad*, 156 Mass. 293, 295 (1892).

tendent undertakes to inspect them and is negligent in so doing.¹³⁷ And again, as an employer's duty to look out for the safety of his employees does not extend to every possible risk to which they may be exposed, it has been held that he cannot be charged with the negligence of his superintendent in failing to warn them of momentary, passing dangers, in those cases where the employees know the likelihood, though perhaps not the exact time, of their occurrence.¹³⁸

But if it is a part of the duty of the superintendent to do certain specific acts for the protection of the employees in his charge, such as the giving of a warning on the approach of danger, they have a right to rely upon his doing those acts, and can recover from the employer for injuries resulting from a neglect of this duty. This rule applies especially to those cases where the duties of the employees are such as to prevent them from protecting themselves from the dangers in question.¹³⁹

"THE NEGLIGENCE OF A PERSON IN THE SERVICE OF THE EMPLOYER"

§ 260. What is Negligence on the Part of the Superintendent. — What constitutes negligence on the part of a superintendent under this clause is, of course, to be determined according to common law principles. It may be sufficient, therefore, simply to state the general proposition that the negligent acts of a superintendent, for which the employer can be held liable under the statute, are of two kinds: first, they may consist of some positive negligent acts, as the giving of an improper order,¹⁴⁰ or the continuing of the work under

¹³⁷ *Shea v. Wellington*, 163 Mass. 364, 370 (1895).

¹³⁸ *McCann v. Kennedy*, 167 Mass. 23 (1896).

¹³⁹ *Davis v. New York, New Haven, etc. Railroad*, 159 Mass. 532, 535 (1893). See also *Hennessy v. Boston*, 161 Mass. 502 (1894), and *Mac'honey v. New York, etc. Railroad*, 160 Mass. 573, 579 (1894).

In *Edgar v. New York, New Haven & Hartford Railroad*, 188 Mass. 420 (1905), it was held that when a superintendent gave an order coupled with an assurance of protection, the duty of using due care to make good the assurance rested upon him as superintendent, and the employee had the right to rely upon his performing that duty.

¹⁴⁰ *McPhee v. Scully*, 163 Mass. 216, 218 (1895).

dangerous conditions;¹⁴¹ or, second, they may consist of a failure to act under circumstances that called for some positive action of a precautionary nature.¹⁴²

When the testimony as to the alleged negligence of the superintendent is contradictory, it is a question of fact for the jury to decide upon a consideration of the whole evidence.¹⁴³

§ 261. The Negligence of the Superintendent need not be the Sole Cause of the Injury. — In order to recover compensation for injuries due to the negligence of the superintendent under this clause of the statute, it is not necessary to show that such negligence was the sole cause of the accident. An employer cannot, therefore, escape liability under the statute

¹⁴¹ *Connolly v. Waltham*, 156 Mass. 368, 370 (1892).

¹⁴² *McCauley v. Norcross*, 155 Mass. 584 (1892); *Carroll v. Willcutt*, 163 Mass. 221, 224 (1895).

¹⁴³ *Murray v. Rivers*, 174 Mass. 46 (1899); *Bourbonnais v. West Boylston Manuf. Co.*, 184 Mass. 250 (1903).

It has been held that there was evidence of negligence on the part of the superintendent where he gave two orders which, if obeyed, would place the employee in a dangerous situation, *O'Brien v. West End Street Railway*, 173 Mass. 105 (1899); where he ordered the employee to a place where he would be exposed to a danger known to him but not to the employee, *Cote v. Lawrence Manufacturing Co.*, 178 Mass. 295 (1901); where he overloaded the chain of a hoisting machine and gave an order to hoist while it was so overloaded, *Pierce v. Arnold Print Works*, 182 Mass. 260 (1902), but if the superintendent leaves the loading of the chain to the employees, there is no negligence on his part: that "was one of the details which he could properly leave to the men who were doing the work," *Nordquist v. Fuller*, 182 Mass. 411 (1903); where he went at some distance from the place where the work was going on without notifying any one or giving any warning, the method of conducting the work being unsafe unless the employees were watched and warned, *Rafferty v. Nawn*, 182 Mass. 503 (1903); where he directed a large stone in a quarry to be placed in an insecure position and ordered the plaintiff to work upon it while it was so placed, *Mahoney v. Bay State Pink Granite Co.*, 184 Mass. 287 (1903); where he ordered a brow, used for transferring freight from one car to another, to be placed and used in a reverse position, *Murphy v. New York, New Haven & Hartford Railroad*, 187 Mass. 18, 20 (1904); where he ordered the plaintiff, with other men, to lift a heavy machine consisting in part of a balance wheel which brought two sharp edges together and which, unless tied, would revolve when the machine was moved, without making sure that the balance wheel was tied, *Cunningham v. Atlas Tack Co.*, 187 Mass. 51 (1904).

for the negligence of his superintendent by showing that acts of his own also contributed to the injury.¹⁴⁴

"WHO WAS ENTRUSTED WITH AND WAS EXERCISING SUPERINTENDENCE"

§ 262. What is a Superintendent. — For the purposes of this statute, a superintendent has been defined as "a man having the control, with the power of authority. That is to say, when he speaks, the workmen are to obey, not because he advises them, or requests them, or hopes they will, but because, by virtue of his position, they have agreed to obey him. That is the nature of his authority. He is entitled to obedience."¹⁴⁵ It has been held, accordingly, that an ordinary weaver, whose usual work was to operate a loom, was not a superintendent within the meaning of the statute, merely because it was also a part of her duty to notify the loomfixer when her loom was out of repair.¹⁴⁶

An officer of a town or city who has charge of a work of a public nature, such as the getting out of gravel to be used in the making of repairs upon the public ways, is not a superintendent within this clause of the statute: he is regarded rather as a public officer engaged in the performance of a public duty.¹⁴⁷

¹⁴⁴ *Connolly v. Waltham*, 156 Mass. 368 (1892), point 1.

¹⁴⁵ Per Mr. Justice Hammond in his charge to the jury, *Malcolm v. Fuller*, 152 Mass. 160, 163 (1890).

¹⁴⁶ *Roseback v. Aetna Mills*, 158 Mass. 379 (1893).

¹⁴⁷ *Murphy v. Needham*, 176 Mass. 422 (1900).

Where the evidence tended to show that the whole undertaking of laying an iron conduit in the bed of a stream was under the general charge of the defendant's master mechanic, but that a foreman was in charge of the particular section where the accident happened; that while this foreman was not constantly present, he was very often there, and the orders under which the work was done came from him and were often given in person; that he employed and discharged men engaged in the work; that he did no manual labor, except to show how the work should be done; it was held that there was sufficient evidence to justify a finding that this foreman was a superintendent. *Pierce v. Arnold Print Works*, 182 Mass. 260, 282 (1902).

In *Brady v. New York, New Haven & Hartford Railroad*, 184 Mass. 225 (1903), the plaintiff was a car inspector whose duty it was to inspect

§ 263. **He must be a Person entrusted with Superintendence.**— In order to charge an employer with the negligence of a third person under this clause of the statute, it is not enough to show simply that such person was, at the time of the negligent act, overseeing workmen who were engaged in doing work for the defendant upon his premises or elsewhere.¹⁴⁸ There must be some evidence tending to show that he was the person entrusted by the employer with the superintendence of those workmen. The average case presents little or no difficulty upon this point, but there is a somewhat perplexing class of cases where it is not clear upon the facts whether the position of the third person with reference to the defendant is that of an independent contractor, or of a person entrusted with superintendence.¹⁴⁹ A decisive test for the determination of the point in that class of cases is: Whether upon all the evidence, the relation between the injured workman and the defendant was that of employer and employee.

That this element of being "entrusted with" superintendence was wanting appears to be the real ground of the decision in the case of *Dane v. Cochrane Chemical Co.*¹⁴⁹ That was a case where the plaintiff, the workman, was injured by the negligent act of A, the person who had charge of the work, and sought to hold the defendant responsible for the consequences of that negligence under this clause. It appeared in

all cars brought into the yard and to make such repairs upon them as were needed and as he could himself make. It appeared that he was not under the orders of the yard master, but that the switching crew were under the orders of the yard master; that he was the only one who controlled the switching of trains in the yard, and that although he had no right to order a car to be moved until the train of which it was a part had been inspected, yet the switching crew would obey his orders as to moving cars even if the inspection had not been completed. The court held that, although the plaintiff was not at work under the yard master but was in a distinct department of the defendant's service, nevertheless the yard master was, within the meaning of the employer's liability act, a superintendent exercising superintendence when he ordered the movement of cars before their inspection was completed, in consequence of which the plaintiff was injured. "This is because all that was done or was to be done as to moving the cars was done and was to be done solely under his direct order and supervision."

¹⁴⁸ See *Dane v. Cochrane Chemical Co.*, 164 Mass. 453 (1895).

¹⁴⁹ *Dane v. Cochrane Chemical Co.*, 164 Mass. 453 (1895).

evidence that the defendant employed A, under a continuing contract, to do all of the work of a certain kind upon its premises, and paid him so much therefor in addition to the pay of each man that he hired to perform the labor; that the defendant furnished the materials for the work and gave to A all the necessary directions for its performance, but left him entirely free to employ his own workmen, of whom the plaintiff was one, to superintend, pay and discharge them as he saw fit; that the defendant kept all of its accounts with A, and none with the workmen; it was held that the defendant was not liable under this clause for the negligence of A, on the ground that the facts failed to establish the relation of employer and employee between the plaintiff and the defendant. In other words, the defendant had never entrusted A with any superintendence over the plaintiff as one of its employees.

It is a question, to which no definite answer appears as yet to have been given, whether an employer would be liable for the negligence of his foreman in doing an act that was properly one of superintendence, but was outside the scope of the superintendence, which had been entrusted to him.¹⁵⁰ The fair meaning of the words "entrusted with" as here used would seem to favor a negative view of the question. And the justice of such a construction is apparent when it is considered that a superintendent is selected with reference to his fitness for the duties that he is employed to perform, and that he may have no qualifications for overseeing other matters which may, incidentally or otherwise, be a part of the employer's business, and which he may, purely as a volunteer, undertake to superintend.¹⁵¹

§ 264. He must be a Person exercising Superintendence.—
"The fact that a person is engaged in superintendence does

¹⁵⁰ *Mahoney v. New York, etc. Railroad*, 160 Mass. 573 (1894), appears to have been such a case; this particular point was not raised, however.

¹⁵¹ The discussion in *Shea v. Wellington*, 163 Mass. 364, 370 (1895), upon a kindred topic, may serve to throw light upon this question also.

Whether the plaintiff's injury was due to the negligence of a "person in the service of the employer who was entrusted with and was exercising superintendence," is generally a question for the jury. See *Ca-vagnaro v. Clark*, 171 Mass. 359, 365 (1898).

not make his employer liable for every act which he does while so engaged."¹⁵² To meet the requirements of this provision of the clause, therefore, it must appear that the negligence of the third person occurred while he was actually in the exercise of the superintendence with which he had been entrusted,¹⁵³ and as a part of that superintendence.¹⁵²

¹⁵² *Joseph v. George C. Whitney Co.*, 177 Mass. 176, 177 (1900).

¹⁵³ *Cashman v. Chase*, 156 Mass. 342 (1892).

The question whether the act of a superintendent in starting a particular machine was an act of superintendence within this clause, has been discussed in several cases. In *Joseph v. George C. Whitney Co.*, 177 Mass. 176 (1900), the facts were that the plaintiff properly had his hand between the jaws of an embossing machine, the power being off; that the superintendent came up and leaned over between the plaintiff's machine and that of another workman for the purpose of giving that other workman instructions; that he probably accidentally touched the shipper of the plaintiff's machine and so started it, causing the injury. It was held that the acts of the superintendent "were too much the accident of his independent personality" to charge the defendant with his negligence. The court adds, at page 178: "The matter may be stated in a different form. If the motion of Meyer [the superintendent] which caused the injury be regarded as part of an act of superintendence, the fact that he was superintending was in no way a necessary element in producing the injury. But we are of opinion that by a true construction of the statute the superintendence must contribute as such, and that when, as here, it had nothing to do with the injury *qua* superintendence, the case is not within the act." In *Roche v. Lowell Bleachery*, 181 Mass. 480 (1902), it appeared that in connection with a washing machine, which the plaintiff was engaged in running, were certain "binders" which frequently became loose and which it was a part of the plaintiff's duty to tighten; that in order to do this he had to stop the machine; that at the time of the accident he had stopped the machine and was engaged in tightening the binders, when the superintendent came along and himself started the machine. It was held that the starting of the machine was an act of superintendence. "The negligence, if there was any, did not consist in the mechanical details of carrying out a proper order; it consisted in setting the machine in motion at that time. If the superintendent had told another workman to start it up, probably the case would not be here. It is true, perhaps, that that could not be accepted as a universal test, because often the negligence is due to the consciousness of the party not having been directed to the point of complaint, which the hypothesis of a direction assumes it to have been. But the test seems to be of use when, as here, the precise object of the superintendent's conception was improper. In such a case the proximity between the brain that conceived and the subordinate ganglion that carried out the thought seems not to be a ground of exoneration. Supposing the order to have been given, it would have been of sufficient importance and would have risen enough above merely mechanical execution of the work that might

In other words, the negligent act must be not only the act of a person who was entrusted with superintendence, but itself an act of superintendence. As was said by Mr. Justice Barker in the course of the opinion in *Cashman v. Chase*:¹⁵⁴

have come from any workman to be matter of superintendence." Chief Justice Holmes, at page 482. In *McPhee v. New England Structural Co.*, 188 Mass. 141 (1905), the employee was killed by the negligent starting of an engine by the superintendent, a part of whose duty it was to run the engine. The court held that this was a case where the negligence consisted in causing the engine to be started at all; not a case where it was proper to start it, and the negligence was in the way in which the starting was carried into effect, and summed up the law as follows: "In the former case, the decision that the engine shall be started is an act of superintendence, and it is none the less so because the manual work of setting the engine in motion is done by the superintendent. The cases of *O'Brien v. Look*, 171 Mass. 36; *Roche v. Lowell Bleachery*, 181 Mass. 480; *Meagher v. Crawford Laundry Machinery Co.*, 187 Mass. 586, are cases belonging to this class. In the latter case the act of negligence is in the way the engine is set in motion it being proper to set it in motion at the time. This is not an act of superintendence, but is an act of a fellow servant, and for that the master is not liable at common law or under the employers' liability act. The cases of *Cashman v. Chase*, 156 Mass. 342; *Riou v. Rockport Granite Co.*, 171 Mass. 162; *Flynn v. Boston Electric Light Co.*, 171 Mass. 395; *Joseph v. George C. Whitney Co.*, 177 Mass. 176; *Hoffman v. Holt*, 186 Mass. 572, are cases belonging to this class."

It was held in *Sullivan v. Thorndike Company*, 175 Mass. 41 (1899), that the instruction "that if H had the right to say to the plaintiff 'take these goods upstairs,' and it was the duty of the man to obey that, that would be superintendence; but that if H merely gave a direction pointing out where the goods were to go, it was not superintendence," was a correct statement of the law.

The act of one house painter in holding a ladder while another painter goes up on it, and negligently letting it slip, is not an act done in the exercise of superintendence, even though the negligent painter was the superintendent in charge of the work. "Where one person acts both as a common laborer and a boss, and is expected to work with and as the other workmen, even his words of command are not necessarily acts of superintendence." *Hoffman v. Holt*, 186 Mass. 572 (1904).

Where the superintendent ordered the moving of a bar and left the means to be employed to the workmen, but came up before the work was completed and took charge of it, the court says that it was not "any the less an act of superintendence on his part that he continued to use the means employed by the men who were then engaged in carrying out his original order than if from the beginning he had supervised the operation, as he had full authority to go on with the work, or get a suitable truck, or employ some other adequate way to move the bar." *Meagher v. Crawford Laundry Machinery Co.*, 187 Mass. 586, 588 (1905).

¹⁵⁴ 156 Mass. 342 (1892), at page 344.

"The employer is not answerable for the negligence of a person intrusted with superintendence, who at the time, and in doing the act complained of, is not exercising superintendence, but is engaged in mere manual labor, the duty of a common workman. The law recognizes that an employee may have two duties: that he may be a superintendent for some purposes, and also an ordinary workman, and that if negligent in the latter capacity the employer is not answerable. Unless the act itself is one of direction or of oversight, tending to control others and to vary their situation or action because of his direction, it cannot fairly be said to be one in the doing of which the person intrusted with superintendence is in the exercise of superintendence."

Whether or not the superintendent was exercising superintendence in the act that caused the injury may be a question for the jury to determine.¹⁵⁵

"AND WHOSE SOLE OR PRINCIPAL DUTY WAS THAT OF SUPERINTENDENCE,"

§ 265. Superintendent must be the Sole or Principal Duty. — Assuming that a plaintiff has established the point that the negligent third person was a superintendent within the meaning of this clause, then comes the inquiry: Was superintendence his sole or principal duty? It is to be noticed that the descriptive words of this phrase are used in the alternative. Provision is thus made for two classes of cases: the one where it appears upon the evidence that superintendence was the sole duty of the person who was entrusted with and was exercising it; the other where it appears that superintendence was his principal duty.

According to the interpretation put upon them by the court, the words "principal duty" mean chief duty in point of time, rather than highest duty in point of grade.¹⁵⁶

¹⁵⁵ See *Green v. Smith*, 169 Mass. 485, 491 (1897).

¹⁵⁶ See *O'Neil v. O'Leary*, 164 Mass. 387, 390 (1895), and cases cited under § 267. But see *Canney v. Walkeine*, 113 Fed. Rep. 66 (1901). In this case the facts were that the alleged superintendent had six or seven men under him; that he selected the stones, put on the chalk line and

§ 266. Superintendence as the Sole Duty. — Whether or not superintendence is a sole duty appears to depend altogether upon the commission that is given to the superintendent. What is his employment? What is expected of him? If he is hired solely to oversee the work that is to be done, and no manual labor is expected of him, then it would seem that superintendence is his sole duty within the meaning of this provision, even though, simply as a volunteer, he occasionally does acts of manual labor; but otherwise if he is also required to do manual labor.

A consequence of the establishment of the fact that superintendence was the foreman's sole duty is that no question can be raised in such a case as to the capacity in which he acts when he gives directions to the workmen in the course of the work of which he has been given the oversight. In giving orders with reference to the doing of that work, he is at no time a common workman, but at all times a superintendent. Therefore, when he gives directions as to that work, they are always more than mere assurances of a fellow workman; it is not possible to interpret them otherwise than as the orders of a superintendent. Hence if superintendence is the foreman's sole duty, the employer is answerable under this clause of the statute for all of his directions to the workmen in the proper execution of the business placed under his charge that are negligently given, and as well for all that

told the men where to cut; that he had charge of the stones from the time they were started in the pit till they left the quarry; that when not otherwise engaged, he would take his hammer and go to work with the rest of the men; that he received higher pay than the men under him. There was some evidence tending to show that even if working with his hands, he was also engaged in keeping an outlook upon the work and in giving directions to the men. The judge told the jury that "if at the same time that he was laboring he was giving directions, and adhering to his right to direct and superintend, and was actually keeping an outlook and directing, then it would become a question for you to determine, notwithstanding the fact of manual labor for a greater or less portion of the time; it would be a question for you to settle upon all the evidence, taking into consideration all the evidence, the amount of labor, the importance of superintendence, the extent of direction — all together, — for you to determine whether his chief duty was that of superintendence." This instruction was sustained upon appeal.

are negligently omitted under circumstances that called for some positive orders.¹⁵⁷

§ 267. **Superintendence as the Principal Duty.** — If it appears upon the evidence in any given case that the superintendent was expected not only to oversee the work, but also to do manual labor, then comes the question whether or not superintendence was his principal duty. To bring a case within the provision as it is interpreted by the court,¹⁵⁸ it is clear that it is not enough to show that he was at the time of the accident performing acts usually done by a superintendent, which it was a part of his duty to perform. On the other hand it is perhaps equally clear that evidence tending to show that he also performed manual labor is not conclusive against the plaintiff.¹⁵⁹ The vital question is: How much manual labor, in point of the time spent upon it, was he required to perform? Upon one side or the other of this question, all of the cases range themselves. Thus, if it appears that a man is set to work with a gang of men, and is expected to do his share of the manual labor, he is held not to be a person whose principal duty is that of superintendence within the meaning of this clause, even though it is also a part of his duty to perform some acts that are consistent with superintendence.¹⁶⁰ But if, on the other hand, a man is placed

¹⁵⁷ *Cavagnaro v. Clark*, 171 Mass. 359, point 2 (1898).

¹⁵⁸ See § 265, *ante*, second paragraph.

¹⁵⁹ *Reynolds v. Barnard*, 168 Mass. 226, point 2 (1897).

¹⁶⁰ *Cashman v. Chase*, 156 Mass. 342 (1892); *O'Connor v. Neal*, 153 Mass. 281, 283 (1891); *Malcolm v. Fuller*, 152 Mass. 160, 163 (1890), *semble*; *O'Brien v. Rideout*, 161 Mass. 170 (1894); *Dowd v. Boston & Albany Railroad*, 162 Mass. 185 (1894); *O'Neal v. O'Leary*, 164 Mass. 387, 389 (1895); *Adasken v. Gilbert*, 165 Mass. 443, 445 (1896); *Roseback v. Aetna Mills*, 158 Mass. 379 (1893); *Cunningham v. Lynn & Boston Street Railway*, 170 Mass. 298 (1898).

In *Mulligan v. McCaffery*, 182 Mass. 420 (1903), it appeared that the alleged superintendent was one of a gang of four men engaged in the common work of digging holes, setting poles, putting on brackets and stringing wires for a street railway; that he did the same work as the others; that he gave directions and orders both when the defendant was present and when he was absent. The court held that "in giving such orders and directions, he acted, it seems to us, as a workman whose experience qualified him to give them, and not as one whose sole or principal duty was that of superintendence. It is manifest, we think, that

in charge of a gang of workmen, and is expected to determine the manner in which they shall do the work and to direct them as to it, he is a person whose principal duty is superintendence, although he may at times take hold with his own hands and assist in the performance of the manual labor.¹⁶¹

Whether or not superintendence was his principal duty is, therefore, commonly a question of fact for the jury to decide upon all the evidence in the case.¹⁶²

Although it appears upon all the evidence that superintendence was the foreman's principal duty, there are still one or two questions that may affect the employer's liability for his negligent acts. First, in what capacity was he acting when he did the negligent act? In his capacity as a superintendent or in that as a fellow workman? Since he occupies this dual position, his negligent directions to the workmen, though in their character acts of superintendence, may be as a matter of fact capable of interpretation either as the orders of a superintendent or as the assurances of a fellow workman. And if they are in fact the latter, the employer will not be liable for their consequences under this clause.¹⁶³

he was there principally as a workman, but by virtue of his greater experience he acted also as foreman of the small gang to which he belonged and gave such directions as the nature of the work required."

¹⁶¹ *Malcolm v. Fuller*, 152 Mass. 160 (1890); *Davis v. New York, New Haven, etc. Railroad*, 159 Mass. 532, 535 (1893); *Prendible v. Connecticut River Manuf. Co.*, 160 Mass. 131, 138 (1893); *Gardner v. New England Telephone, etc. Co.*, 170 Mass. 156 (1898); *O'Brien v. Look*, 171 Mass. 36 (1898); *Riou v. Rockport Granite Co.*, 171 Mass. 162 (1898); *Mahoney v. Bay State Pink Granite Co.*, 184 Mass. 287, 288 (1903).

¹⁶² *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202, 216 (1896); *Crowley v. Cutting*, 165 Mass. 436 (1896); *Malcolm v. Fuller*, 152 Mass. 160 (1890); *Knight v. Overman Wheel Co.*, 174 Mass. 455, 460 (1899).

As to the wages paid to the alleged superintendent as evidence upon this issue, the court says in *O'Brien v. Look*, 171 Mass. 36, 41 (1898): "The fact that Lowrey was paid higher wages than an ordinary laborer was a circumstance to be considered in connection with the other circumstances upon the question whether his sole or principal duty was that of superintendence. In many cases it would have little or no significance; but while alone it would prove nothing, it was proper for the consideration of the jury in the form in which it was stated, and in connection with other evidence bearing upon the question."

¹⁶³ *Whittaker v. Bent*, 167 Mass. 588 (1897), and see also the discussion in *Cavagnaro v. Clark*, 171 Mass. 359 (1898), point 2.

Again, assuming that he was acting in the capacity of a superintendent, was the negligent act in its character an act of superintendence, or merely an act of manual labor? It has been held upon this question that if "there was nothing in it involving any control over or direction to or oversight of any other workman, or requiring any skill, or distinguishing it from any other act of manual labor," it could not be regarded as an act of superintendence for which the employer would be responsible under this clause.¹⁶⁴

"OR, IN THE ABSENCE OF SUCH SUPERINTENDENT, OF A PERSON ACTING AS SUPERINTENDENT WITH THE AUTHORITY OR CONSENT OF SUCH EMPLOYER;"

§ 268. What will satisfy this Provision.—It has been held to be sufficient to satisfy the requirements of this provision if it appears that the person acting as superintendent was entrusted with the duty of superintending the particular work in the course of which the accident happened by the general superintendent of the defendant, and that the latter took no charge of that work and was not present while it was being done.¹⁶⁵

¹⁶⁴ *Riou v. Rockport Granite Co.*, 171 Mass. 162 (1898); *Flynn v. Boston Electric Light Company*, 171 Mass. 395 (1898).

¹⁶⁵ *Knight v. Overman Wheel Co.*, 174 Mass. 455, 460 (1899).

In *McCabe v. Shields*, 175 Mass. 438, 446 (1900), the court says that since this provision became a part of clause two, "there being no question of variance raised in the case, it was sufficient, on the question of superintendence, for the plaintiff to show that Hannon, when neither defendant was present, was acting as superintendent with the authority and consent of the defendants."

For suggestions as to form for declaration under clause two, see *Malcolm v. Fuller*, 152 Mass. 160 (1890); *Fitzgerald v. Boston & Albany Railroad*, 156 Mass. 293 (1892); *O'Brien v. Rideout*, 161 Mass. 170 (1894); *Dane v. Cochrane Chemical Co.*, 164 Mass. 453 (1895).

The question of the negligence of the superintendent under various sets of circumstances was discussed in the following cases: *Sullivan v. Lally*, 166 Mass. 265 (1896); *Gagnon v. Seaconet Mills*, 165 Mass. 221 (1896); *Crowley v. Cutting*, 165 Mass. 436, 438 (1896); *Perry v. Old Colony Railroad*, 164 Mass. 296, 300 (1895); *McPhee v. Scully*, 163 Mass. 216, 218 (1895); *Carroll v. Willcutt*, 163 Mass. 221, 224 (1895); *Hennessy v. Boston*, 161 Mass. 502 (1894); *Tremblay v. Mapes-Reeve Construction Co.*, 169 Mass. 284 (1897); *Scullane v. Kellogg*, 169 Mass.

"THIRD, THE NEGLIGENCE OF A PERSON IN THE SERVICE OF THE EMPLOYER WHO WAS IN CHARGE OR CONTROL OF A SIGNAL, SWITCH, LOCOMOTIVE ENGINE OR TRAIN UPON A RAILROAD;

"THE EMPLOYEE, OR HIS LEGAL REPRESENTATIVES, SHALL, SUBJECT TO THE PROVISIONS OF THE EIGHT FOLLOWING SECTIONS, HAVE THE SAME RIGHTS TO COMPENSATION AND OF ACTION AGAINST THE EMPLOYER AS IF HE HAD NOT BEEN AN EMPLOYEE, NOR IN THE SERVICE, NOR ENGAGED IN THE WORK, OF THE EMPLOYER."

§ 269. This Clause further enlarges the Liability of Employers. — It is elementary law that an employee injured in consequence of the negligence of such a person as is described in this clause had no remedy before the passage of the employers' liability act against his employer.¹⁶⁶ The fellow-servant doctrine served as an effectual bar to any recovery in such a case. This clause of the statute has, therefore, extended still further the liability of employers. It has shifted to their shoulders a burden that at common law rested only upon the negligent fellow employee. Thus, as in the case of the second clause, this clause in effect takes the particular class of employees which it describes out of the common law category of fellow servants to a certain extent, and to that extent makes the employers directly responsible for certain of their negligent acts.

§ 270. The Scope of this Clause. — This third clause of the statute has a more restricted field for its operation than the preceding clauses, both by reason of the nature of its subject-matter and by reason of the construction given to it.

As to the subject-matter, it is plain that it is of such a nature that it can apply, not to employers in general, but only to a particular class of employers. This fact alone serves of course to materially abridge its field of operation.

The construction placed upon its terms by the court has still further limited its scope. The rule as to the construc-

544 (1897); *Dean v. Smith*, 169 Mass. 569 (1897); *Fleming v. Elston*, 171 Mass. 187 (1898); *Gouin v. Wampanoag Mills*, 172 Mass. 222 (1898).

¹⁶⁶ *Farwell v. Boston & Worcester Railroad*, 4 Met. 49 (1842).

tion of statutes in derogation of the common law¹⁶⁷ is, it seems, to be more strictly applied to the provisions of this clause. They are construed, therefore, as imposing a liability upon the employer only for the negligence of an employee in the management of the particulars which are specifically mentioned in it as being in the charge or control of such employee: it does not enlarge the common law liability as to the management of any other matter.¹⁶⁸ And further, the clause is construed as imposing a liability upon the employer only for the negligence of an employee in the charge or control of a "signal, switch, locomotive engine or train," when completed and used as a whole: it does not apply to negligence in the management of any of them while in the process of construction.¹⁶⁹ This latter point is illustrated in *Thyng v. Fitchburg Railroad*.¹⁶⁹ In that case it appeared that the employee, a brakeman, was injured by the breaking apart of the freight train upon which he was riding in the performance of his duty, while in transit from one station to another; and that the train broke apart by reason of the negligence of the conductor of a switch engine in making up the train in the freight yard. It was held that the injury was not due to the negligence of any person in charge or control of the train within the meaning of this clause, on the ground that the conductor of the switch engine never had the charge or control of the train as a whole.

"THE NEGLIGENCE OF A PERSON IN THE SERVICE OF THE EMPLOYER"

§ 271. For whose Negligence the Employer is made Responsible. — This provision of the clause does not require

¹⁶⁷ See *Gibson v. Jenney*, 15 Mass. 205 (1818).

¹⁶⁸ *Thyng v. Fitchburg Railroad*, 156 Mass. 13, 18 (1892).

¹⁶⁹ *Thyng v. Fitchburg Railroad*, 156 Mass. 13, 17 (1892). In this case at page 18 Mr. Justice Knowlton says: "The statute, in referring to a 'signal, switch, locomotive engine or train,' seems chiefly to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who, either wholly or in part, control its movements. The charge or control is of that whose characteristic is rapid and forceful motion. It relates to the train or locomotive engine as a whole, and not to the individual parts which make up the train or engine."

that the person who has the charge or control of the matters specified should be a conductor or an engineer, or that he should have any particular official position. It is the negligence of any employee who has the charge or control of them, even though he has it only for the time being and for a temporary purpose. As a matter of construction, therefore, and without the aid of legislative enactment,¹⁷⁰ the case is brought within this clause where a train was backing down with only an engineer and a brakeman in charge or control, it being the duty of the latter to see that there was no obstruction upon the track and to stop the train or to give a warning in case of danger, and the plaintiff was injured by reason of the negligence of the brakeman in the performance of those duties.¹⁷¹

"WHO WAS IN CHARGE OR CONTROL"

§ 272. The Meaning of "Charge or Control." — Although the descriptive words of this provision are used in the alternative, the distinctive meaning of the two words is not given effect. As interpreted by the court, the important word of the two is "charge": the word "control" is assimilated to it in meaning. It is not, the court holds, that the two words are to be regarded as exactly synonymous, but "as explanatory of each other, and used together for the purpose of describing more fully one and the same thing."¹⁷²

¹⁷⁰ The final provision of this section of the statute covers a case of this kind. See § 272, *post*.

¹⁷¹ Steffee *v.* Old Colony Railroad, 156 Mass. 262 (1892).

"A railroad company is liable alike for negligence of an engineer in charge of a locomotive engine, and for negligence of a brakeman in charge of a train, for the statute expressly applies to both." Shea *v.* New York, New Haven & Hartford Railroad, 173 Mass. 177, 179 (1899).

¹⁷² Caron *v.* Boston & Albany Railroad, 164 Mass. 523, 527 (1895).

"If 'control' is one thing and 'charge' is another, then, inasmuch as to some extent every brakeman upon a train would have 'control' of it, every employee injured by an accident resulting from the carelessness of a brakeman would have a right of action against the corporation which employed him, and the defence of common employment as to brakemen would be done away with, even though the brakemen might be acting under an immediate superior. . . . It is the charge or control of which the statute speaks, and not a charge or control, and it is the charge or

This construction, when applied to a "train," must bar out of the statute, it seems, that class of cases where an injury results in consequence of the negligent management of the train by some subordinate member of the train gang, who had at the time the physical power to direct its movements, but not the right to exercise that power save under the immediate orders of his superior.¹⁷³ This result does not follow, of course, from the fact that the negligent employee was a subordinate; he may be a subordinate and yet have the "charge or control" of the train.¹⁷⁴ The distinction between the two classes of cases — the one falling without the clause and the other within — appears to be the distinction between the mere physical power to manage the train, and that power coupled with the right or duty to exercise it. That is, in the first class of cases the negligent employee has simply the physical power to direct the movements of the train, without the right or duty of exercising that power, save as he is ordered so to do by his superior; while in the second class of cases the negligent employee has, not alone the physical power to manage the train, but also the right and duty of so doing at his own discretion untrammelled by the particular control of a superior.

In the closing paragraph of this section of the statute the legislature has defined a person "in charge or control" in the following language: "Whoever, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive engine or train shall be deemed to be a person in charge or control of a signal, switch, locomotive engine or train within the meaning of said clause."

control of the train as a connected whole which is meant, not of portions which together form a whole. We think, therefore, that by the words 'any person . . . who has the charge or control' is meant a person who, for the time being at least, has immediate authority to direct the movements and management of the train as a whole, and of the men engaged upon it." Mr. Justice Morton, at page 528.

¹⁷³ See instructions to the jury, *Devine v. Boston & Albany Railroad*, 159 Mass. 348, 349 (1893).

¹⁷⁴ *Steffee v. Old Colony Railroad*, 156 Mass. 262 (1892). And see § 271.

§ 273. The Entire "Charge or Control" need not be in one Person. — It does not follow from the construction given to this provision that the entire "charge or control" of a train must be vested in only one person at a time. It may, on the contrary, be vested in at least two persons at the same time. It has been held, thus, that for some purposes the "charge or control" of a train is to be regarded as vested in the conductor¹⁷⁵ or in a brakeman,¹⁷⁶ while for other purposes, as for giving signals or for slackening speed on the approach to danger, it is to be considered as vested in the engineer.¹⁷⁷

§ 274. The Person in "Charge or Control" need not be upon the Train. — It is not necessary, in order to bring a case within the accepted meaning of this provision, to show that the person alleged to have been in "charge or control" of the train was actually upon it,¹⁷⁸ or even near to it,¹⁷⁹ at the time of the accident, provided it is moved under, and in accordance with, his directions.

It has been held accordingly that where, by the orders of the conductor who stood near by and operated the switch, two cars were uncoupled from the engine and shunted on to a siding with too great force, in consequence of which the brakeman upon them was injured, the conductor was so far in "charge or control" of the train as to render the railroad company liable for the brakeman's injury under this clause.¹⁸⁰ So also where the conductor left his train at Hyde Park in

¹⁷⁵ *Donahoe v. Old Colony Railroad*, 153 Mass. 356 (1891); *Devine v. Boston & Albany Railroad*, 159 Mass. 348 (1893).

¹⁷⁶ *Shea v. New York, New Haven & Hartford Railroad*, 173 Mass. 177 (1899).

¹⁷⁷ *Davis v. New York, New Haven & Hartford Railroad*, 159 Mass. 532 (1893).

¹⁷⁸ *Devine v. Boston & Albany Railroad*, 159 Mass. 348 (1893); *Brady v. New York, New Haven & Hartford Railroad*, 184 Mass. 225 (1903).

¹⁷⁹ *Donahoe v. Old Colony Railroad*, 153 Mass. 356 (1891); *Carroll v. New York, New Haven & Hartford Railroad*, 182 Mass. 237, 242 (1902). In this last case the court says: "A conductor of a freight train may be found to be in charge thereof, although he is temporarily absent upon a duty incident to the proper management of the train, and nothing is done meanwhile contrary to his orders or expectation of what would be done."

¹⁸⁰ *Devine v. Boston & Albany Railroad*, 159 Mass. 348 (1893).

order to perform there certain duties incident to his employment, and meanwhile by his directions the train proceeded to Readville, a short distance beyond, for the purpose of taking on certain empty cars, and the plaintiff was injured during this operation, it was held that the conductor was still in "charge or control" of the train at the time when the accident happened, within the meaning of this clause.¹⁸¹

"OF A SIGNAL, SWITCH, LOCOMOTIVE ENGINE OR TRAIN"

§ 275. The Clause applies only to a "Signal, Switch, Locomotive Engine or Train" as a Whole. — It seems that this clause of the statute applies only to a signal, switch, locomotive engine or train as a whole. The negligence of any person in "charge or control" of any of these matters while in the process of construction would not, therefore, come within the statute.¹⁸²

§ 276. What constitutes a "Train." The Number of Cars Necessary. — In *Dacey v. Old Colony Railroad*,¹⁸³ Mr. Justice Knowlton, speaking for the court upon this subject, said: "We think a locomotive and one or more cars connected together and run upon a railroad constitute a train within the meaning of that word as used in the statute." It was subsequently held that it was not essential to the definition that the cars should, at the time of the accident, be moving by direct power from the engine,— it was enough if they were moving by their own momentum. It is not necessary, therefore, that there should be a locomotive attached to the cars at the moment when the accident happens.¹⁸⁴ In the light of this decision the court in a subsequent case defined

¹⁸¹ *Donahoe v. Old Colony Railroad*, 153 Mass. 356 (1891).

¹⁸² See *Thyng v. Fitchburg Railroad*, 156 Mass. 13, 18 (1892).

"The language of the statute seems to us clearly to show that a person having control of a switch is not a person in charge or control of a train." *Fairman v. Boston & Albany Railroad*, 169 Mass. 170, 177 (1897).

¹⁸³ 153 Mass. 112, 115 (1891).

In *Shea v. New York, New Haven & Hartford Railroad*, 173 Mass. 177 (1899), it was held that a switching engine and one car constituted a "train."

¹⁸⁴ *Caron v. Boston & Albany Railroad*, 164 Mass. 523, 527 (1895).

a train as "a number of cars coupled together, forming one connected whole and moving from one point to another upon a railroad, in the ordinary course of its traffic, under an impetus imparted to them by a locomotive which shortly before the accident had been detached."¹⁸⁴

In the last paragraph of this section the legislature defines a train as "one or more cars which are in motion, whether attached to an engine or not."

The important contribution to the subject made by this statutory provision appears to be that it settles the question as to the number of cars which may be necessary to constitute a train. It may be observed that it requires the car or cars to be "in motion."

"UPON A RAILROAD;"

§ 277. The Construction of the Word "Railroad."— This word is given a popular, rather than a strict, interpretation. Its meaning, therefore, is not confined to railroads owned and operated by railroad corporations, but includes whatever may popularly be termed a railroad. Hence the length or permanence of the track is not material; although it be short, and laid and used by a contractor for a temporary purpose only, it is a railroad within the meaning of the word as here used.¹⁸⁵

Furthermore, these words are interpreted to mean a railroad upon which the engines and trains are operated and run, or were "originally intended to be operated and run in some manner and to some extent by steam." It has been held, therefore, that a car of a street railway company operated by electricity in the manner in which cars upon street electric lines are usually operated, could not be regarded as a locomotive engine or train upon a railroad within the meaning of this clause of the statute.¹⁸⁶

¹⁸⁴ Coughlan *v.* Cambridge, 166 Mass. 268, 276 (1896); Doughty *v.* Firbank, 10 Q. B. D. 355 (1883).

¹⁸⁵ Fallon *v.* West End Street Railway, 171 Mass. 249 (1898).

The court in that case further says: "Possibly a railroad, where the motive power has been changed in part or altogether from steam to elec-

§ 278. The Construction of the Phrase "upon a Railroad." — It was said in *Thyng v. Fitchburg Railroad*¹⁸⁷ that the statute "seems chiefly to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who, either wholly or in part, control its movements." The idea there expressed largely shapes the construction to be given to this provision. In order to come within the meaning of the clause, therefore, it must appear that the locomotive engine or train was, at the time of the accident, upon the railroad track and actually used, or possibly about to be used, in the ordinary course of the company's business. This interpretation bars out of the statute the case where an employee was injured by reason of the negligent management of his engine by the engineer, in the course of certain repairs that he was making upon it while it was stalled in the roundhouse.¹⁸⁸

"THE EMPLOYEE, OR HIS LEGAL REPRESENTATIVES,"

§ 279. The Meaning of this Provision. — This provision is not so construed as to make the death of the employee a substantive cause of action. The legal representatives of the deceased employee are held simply to succeed to the rights and remedies of their testate or intestate.¹⁸⁹

"SHALL, SUBJECT TO THE PROVISIONS OF THE EIGHT FOLLOWING SECTIONS, HAVE THE SAME RIGHTS TO COMPENSATION AND OF ACTION AGAINST THE EMPLOYER AS IF HE HAD NOT BEEN AN EMPLOYEE, NOR IN THE SERVICE, NOR ENGAGED IN THE WORK, OF THE EMPLOYER."

§ 280. The Position of an Employee who sues under this Statute. — The language of this provision pretty clearly intricacy, or some other mechanical agency, but which retains in other respects the characteristics of a steam railroad, would come within the purview of the act."

¹⁸⁷ 156 Mass. 13, 18 (1892).

¹⁸⁸ *Perry v. Old Colony Railroad*, 164 Mass. 296, 301 (1895).

¹⁸⁹ *Ramsdell v. New York & New England Railroad*, 151 Mass. 245 (1890). "It is quite apparent that clause 3 of § 1 gives the legal representatives of a deceased employee merely a right to recover the damages to which he was entitled at the time of his death."

dicates an intention on the part of the legislature that an employee who sued under this statute should occupy a position as advantageous as, but no better than, that of any one of the public suing under the same circumstances. This position the courts have, in most respects, accorded to him.

Whatever advantages the rules of law afford to one of the public in establishing a case for personal injuries, are given to the employee who sues under the statute. In actions at common law for personal injuries, an employee could very rarely, if ever, make out a *prima facie* case by simply showing that the accident happened; he was obliged to go further and to submit some evidence of negligence on the part of the employer.¹⁹⁰ But in a suit under the statute he can avail himself of the maxim *res ipsa loquitur* to the same extent and with the same effect as though he had not been an employee. When, therefore, the accident is one that the exercise of ordinary care on the part of the employer would commonly prevent, evidence of the happening of the accident, without more, may make out for him a *prima facie* case.¹⁹¹

As to the defences available against an employee who sues

¹⁹⁰ *Duffy v. Upton*, 113 Mass. 544 (1873); *Reed v. Boston & Albany Railroad*, 164 Mass. 129 (1895).

¹⁹¹ *Graham v. Badger*, 164 Mass. 42, 47 (1895); *Hennessy v. Boston, 161 Mass. 502 (1894); Mahoney v. New York, etc. Railroad*, 160 Mass. 573, 579 (1894).

It was held in *Gregory v. American Thread Co.*, 187 Mass. 239, 242 (1905), that the starting of a machine of itself was some evidence that it was in a defective condition.

In *Shea v. New York, New Haven & Hartford Railroad*, 173 Mass. 177, 178 (1899), the plaintiff, a car cleaner, was properly riding in a car that was being switched to the cleaning train; the car was pushed back so rapidly that when it struck the cleaning train, the plaintiff was thrown down and injured. It was held that "in the absence of any other explanation of that which occurred, the collision itself, under the circumstances testified to, was some evidence of negligence on the part of the person who should have seen that the train was managed safely."

"The question when the rule *res ipsa loquitur* can be applied with safety must be considered always with reference to the special facts of the case and the teachings of experience with regard to them. General propositions and decisions upon different facts are equally useless." Mr. Justice Holmes in *Copithorne v. Hardy*, 173 Mass. 400, 402 (1899).

under the statute, it is generally conceded that all which are not based upon the relation of master and servant are still open to the employer. In this respect the employee has no better position than any stranger.¹⁹² But, on the other hand, he is not given, in all points, so good a position. As the statute is construed, not quite all the special defences that the common law afforded to an employer are abolished: the relation of master and servant is recognized as so far continuing in existence between them that the employer can still avail himself of the defence of assumption of risk — a defence growing directly out of the contract of employment.¹⁹³ In this single instance there appears to have been a departure from the natural and uniform development of the law under the statute.

The position of the employee who sues under the statute is not, therefore, on the whole exactly that occupied by one of the public suing under the same circumstances. Nor does it appear to have any exact legal analogy — the nearest approach thereto is perhaps the position occupied by an independent contractor.

SECTION 72. If the injury described in the preceding section results in the death of the employee, and such death is not instantaneous or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal representatives of said employee may, in the action brought under the provisions of the preceding section, recover damages for the death in addition to those for the injury.

§ 281. This Section further extends the Liability of Employers. — The general effect of this section of the statute, in so far as it makes the death itself of an employee a substantive cause of action, is to bring about another wide departure from the common law doctrines of master and

¹⁹² *Weblin v. Ballard*, 17 Q. B. D. 122 (1886); *Pettingell v. Chelsea*, 161 Mass. 368 (1894).

¹⁹³ See § 226, *ante*.

Suggestions as to the form of a declaration under this clause may perhaps be found in *Ramsdell v. New York & New England Railroad*, 151 Mass. 245 (1890).

servant, in accordance with which there was, of course, no liability for causing the death of an employee. And by so doing, the section has increased the liability of employers, even beyond the point reached under the statute as originally enacted in 1887.¹⁹⁴

§ 282. The Rights given by this Section. — The statute, as it now stands, recognizes two kinds of death, and deals with each in a different manner. The provisions of this section, by express limitation, deal only with that kind of death which "is not instantaneous or is preceded by conscious suffering." Under this particular division of the subject, two distinct causes of action are specified and regulated: the one for the injury, the other for the death. For both of these causes the right of action, it will be observed, is vested in the same persons, — the legal representatives of the deceased employee.

The terms of the section place no limitation upon the right to sue for the conscious suffering of the deceased; that was given by the statute as it was originally enacted,¹⁹⁵ and survives to the legal representatives under all circumstances. The amount of damages recovered in such suit would, it seems, become a part of the assets of the estate of the deceased, and thus be subject to the claims of creditors and legatees.

On the other hand, the right of action for the death itself is expressly limited to those cases where the deceased leaves a widow or dependent next of kin. And the amount apportioned as damages for this cause of action does not go to the legal representatives of the deceased, but directly to his widow or dependent next of kin.

¹⁹⁴ The provisions of this section were first enacted by the legislature in 1892. Acts, 1892, ch. 260, § 1.

A person cannot bring one suit as widow, for the benefit of herself and of the next of kin, to recover for the death of an employee, and another suit as administratrix of his estate to recover for the conscious suffering. It is the object of the statute to require the joinder of suits for the conscious suffering and for the death "to avoid multiplicity of suits, and to keep the entire damages recoverable within the imposed restriction. No provision is made for separate actions, and being a purely statutory remedy it must be strictly followed." *Smith v. Thomson-Houston Electric Co.*, 188 Mass. 371, 377 (1905).

¹⁹⁵ *Ramsdell v. New York & New England Railroad*, 151 Mass. 245 (1890); *Clark v. New York, Providence & Boston*, 160 Mass. 39 (1893).

SECTION 73. If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of section seventy-one, an employee is instantly killed, or dies without conscious suffering, his widow or, if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer.

§ 283. The Subject Matter and Object of this Section. — This section of the statute deals with the second kind of death recognized by the statute, namely, death that is instantaneous or without conscious suffering. It is treated differently from death that is not instantaneous or is preceded by conscious suffering mainly in respect to the parties in whom the right of action is vested.¹⁹⁶

The intention of the legislature in enacting this portion of the statute was obviously to make some provision for those persons who were dependent upon the deceased employee for support. The process that was adopted for the accomplishment of this object is both simple and direct, — the widow of the deceased is given the right to maintain in her own name an action against the employer for causing the death; or if there is no widow, then the same right is extended to any dependent next of kin. And the amount of damages recovered in such suit is given directly to the widow or to the dependent next of kin, as the case may be. Never constituting a part of the assets of the estate of the deceased employee,¹⁹⁷ it is freed from all possible claims of his creditors, or of legatees under any will he may leave.

§ 284. Due Care on the Part of the Deceased Employee. — It is a plain condition that, in order to maintain an action under this section or under the preceding section, the plaintiff must show that the deceased was, at the time of the accident which resulted in his death, in the exercise of due care.¹⁹⁸

¹⁹⁶ See § 282, *ante*.

¹⁹⁷ See *Smith v. Thomson-Houston Electric Co.*, 188 Mass. 371, 376 (1905).

¹⁹⁸ *Lothrop v. Fitchburg Railroad*, 150 Mass. 423 (1890); *Shea v. Boston & Maine Railroad*, 154 Mass. 31 (1891); *Browne v. New York, etc. Railroad*, 158 Mass. 247 (1893); *McLean v. Chemical Paper Co.*, 165

So far as this burden is concerned, the widow or next of kin stand in no better position than would the employee if he had survived. The only difference that can be suggested as to the position of these two classes of plaintiffs in this respect is in the character of the evidence with which the burden of proof is generally sustained. In most suits brought by the employee himself there is direct evidence upon the issue; while in most cases of death which is instantaneous or without conscious suffering there can be no such evidence. In these latter cases the plaintiff is generally obliged to establish the fact of due care by the aid of evidence from which it may properly be inferred. And it has been held that the jury may as properly infer due care on the part of the deceased from the absence of negligence, where there is a full disclosure of the facts of the case, as from direct evidence of diligence.¹⁹⁹

"IF, AS THE RESULT OF THE NEGLIGENCE OF AN EMPLOYER HIMSELF, OR OF A PERSON FOR WHOSE NEGLIGENCE AN EMPLOYER IS LIABLE UNDER THE PROVISIONS OF SECTION SEVENTY-ONE,"

§ 285. The Distinction made between the Negligence of the Employer and the Negligence of his Employees. — This provision of the section makes a clear distinction between the negligence of an employer himself and the negligence of those employees for whose negligence the statute makes him liable. The effect of this distinction, so far as this part of the statute is concerned, is that the liability imposed by this section for the negligence of an employer himself is very broad, covering any negligent act of his whatsoever; but as to the negligence

Mass. 5 (1895); *Dyer v. Fitchburg Railroad*, 170 Mass. 148 (1898); *Hudson v. People's Street Railway*, 175 Mass. 23 (1899); *Jean v. Boston & Maine Railroad*, 181 Mass. 197 (1902); *Jones v. New York, New Haven & Hartford Railroad*, 184 Mass. 89 (1903).

¹⁹⁹ *Caron v. Boston & Albany Railroad*, 164 Mass. 523, 525 (1895); *Garant v. Cashman*, 183 Mass. 13, 18 (1903). And see § 233.

Speaking upon this subject in *Garant v. Cashman*, 183 Mass. 13, 18 (1903), the court says: "It does not appear that he was guilty of any negligent act, and from this alone due care may be inferred. Being engaged upon his work in the usual way, and where he had a right to be, nothing further appearing, the jury would be justified in assuming that he was in the exercise of due care."

of his employees is strictly limited to those particular classes of negligent acts which are specified in the several clauses of section seventy-one.²⁰⁰ As was pointed out by Mr. Justice Knowlton in *Welch v. Grace*:²⁰⁰ "The clause 'under the provisions of this act' qualifies only the clause 'any person for whose negligence the employer is liable,' and does not limit the preceding clause, 'as the result of the negligence of an employer.' The effect of the section is to give a right of recovery whenever a person is instantly killed or dies without conscious suffering as the result of any negligence of the employer himself, but not to give the right when a death occurs from the negligence of an employee, unless the negligence is of a kind that would subject the employer to a liability under the first section of the statute if the deceased person had been injured and had survived."

"AN EMPLOYEE IS INSTANTLY KILLED, OR DIES WITHOUT CONSCIOUS SUFFERING,"

§ 286. **The Burden of proving the Death to have been Instantaneous or without Conscious Suffering.** — In order to maintain an action under this section, the widow or the dependent next of kin of the deceased employee must satisfy the jury that his death was instantaneous or without conscious suffering. Where there is available no direct testimony bearing upon the point, this burden may be sustained by putting in evidence all the circumstances of the case.²⁰¹ Thus, where the deceased was knocked from the rear car of a freight train by the contact of his head with a bridge, the court held that, taking into account the speed of the train, the lesions upon his head, and the fact that no outcry was heard, the inference was justified that he died instantly or without conscious suffering.²⁰²

It is to be observed that these phrases are used in the alter-

²⁰⁰ *Welch v. Grace*, 167 Mass. 590, 592 (1897).

²⁰¹ *Maher v. Boston & Albany Railroad*, 158 Mass. 36 (1893); *Mears v. Boston & Maine Railroad*, 163 Mass. 150 (1895); *Green v. Smith*, 169 Mass. 485 (1897).

²⁰² *Maher v. Boston & Albany Railroad*, 158 Mass. 36, 45 (1893).

native. If, therefore, it appears from the evidence that the employee was not instantly killed, the plaintiff may still sustain the burden of proof imposed by this provision by showing that, though not instantly killed, he died without ever having regained consciousness.²⁰³

§ 287. What constitutes Death without Conscious Suffering. — What constitutes death without conscious suffering within the meaning of this provision of the section is, of course, a question of fact for the jury to determine. It has been held that the jury was warranted in finding that the deceased employee died without conscious suffering where it appeared that his body was crushed by a car, but that he took two or three steps after he was struck by it.²⁰⁴ So, also, where the evidence showed that death resulted from concussion of the brain, although it appeared that he uttered a few scattering words after the accident.²⁰⁵

“ HIS WIDOW OR, IF HE LEAVES NO WIDOW, HIS NEXT OF KIN,”

§ 288. In whom the Right of Action is vested. — This section of the statute gives the right of action only to the

²⁰³ Hodnett v. Boston & Albany Railroad, 156 Mass. 86 (1892).

²⁰⁴ Mears v. Boston & Maine Railroad, 163 Mass. 150 (1895).

²⁰⁵ Willey v. Boston Electric Light Co., 168 Mass. 40 (1897). See also Mulcahey v. Washburn Car Wheel Co., 145 Mass. 281 (1887); Hodnett v. Boston & Albany Railroad, 156 Mass. 86 (1892); Green v. Smith, 169 Mass. 485 (1897).

In Knight v. Overman Wheel Co., 174 Mass. 455, 463 (1899), there was evidence tending to show that the deceased employee made two or three brief exclamations after the accident happened; that he groaned three or four times and that his eyes were open; that he was found to be dead when carried out from the place of the accident. It was held that on this evidence it was a question for the jury whether or not the death was preceded by conscious suffering. The court adds: “If an injured person remains conscious after the injury, even for a short time only, it is a reasonable conclusion that he lived in a state of conscious suffering.”

Where the plaintiff, a brakeman on a freight train, was thrown from the car upon which he was riding in such a way that his foot caught on the car and he was dragged about one hundred and sixty feet, during which he received but slight injuries, and was then drawn under the car and his head severed from his body, it was held that his death was preceded by a period of conscious suffering, although the whole accident occupied only a few seconds. Martin v. Boston & Maine Railroad, 175 Mass. 502 (1900).

widow or the dependent next of kin of the deceased employee.²⁰⁶ Not only does it not give any right of action to his legal representatives, but the provisions of this section cannot be so combined with the provisions of section two hundred and sixty-seven of chapter one hundred and eleven of the Revised Laws²⁰⁷ as to enable such representatives to maintain an action where the death of the employee was instantaneous or without conscious suffering, and no widow or dependent next of kin survived him.²⁰⁸

This provision does not, however, require that where there is no widow, the action shall be brought by all of the next of kin suing jointly. Any one of them alone, who was at the time of the death dependent upon the wages of the deceased employee for support, can maintain an action.²⁰⁹

It is not necessary that the dependent next of kin should be a citizen or a resident of this Commonwealth, or even of the United States. The mere fact, therefore, that the plaintiff is a non-resident alien will not prevent him from maintaining an action under this section of the statute.²¹⁰

²⁰⁶ See *Clark v. New York, Providence & Boston Railroad*, 160 Mass. 39 (1893).

²⁰⁷ Acts, 1883, ch. 243.

²⁰⁸ *Dacey v. Old Colony Railroad*, 153 Mass. 112, 118 (1891).

²⁰⁹ *Daly v. New Jersey Steel & Iron Co.*, 155 Mass. 1, 4 (1891).

²¹⁰ *Vetaloro v. Perkins*, 101 Fed. Rep. 393 (1900); *Mulhall v. Fallon*, 176 Mass. 266, 269 (1900). In this last case the court says that the statute "is primarily a penalty for the protection of the life of a workman in this State. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death."

In *Silva v. New England Brick Co.*, 185 Mass. 151 (1904), the suit was brought by the administrator of the deceased employee. The declaration alleged that the deceased was instantly killed and that he left "no widow but three children for whose use and benefit this action is brought." The plaintiff moved to amend by inserting the names of the children as plaintiffs and by alleging that they were dependent upon the wages of the deceased for support. It was held that the allegations of the declaration showed "that the cause of action intended to be relied on was the right of recovery given by the statute to the next of kin in cases of instant death. . . . The mistake arose, not in regard to the nature of the cause of action, but in supposing that the administrator was the party in whose name the action should be brought. And in such a case it is plain that the court has power to allow an amendment bringing in the proper parties."

"WHO, AT THE TIME OF HIS DEATH, WERE DEPENDENT UPON HIS WAGES FOR SUPPORT,"

§ 289. The Next of Kin must establish the Fact of Dependence.— Under this provision of the section the burden rests upon the next of kin who brings the suit to show that he or she was, at the time of the death of the deceased employee, dependent upon his wages for support.²¹¹ But in order to sustain this burden of proof, the plaintiff is not required to show legal dependence: whether or not the deceased employee was bound, under the provisions of section ten, chapter eighty-one of the Revised Laws, to support the plaintiff is not material upon this issue. Evidence showing the mere fact of dependence is sufficient.²¹²

§ 290. What constitutes Dependence for Support.— The question of dependency upon the wages of the deceased employee for support, under this section of the statute, as under the statute relating to beneficiary associations, is treated solely as a question of fact. Thus, where it appeared that the plaintiff, who was a daughter of the deceased, had lived with him; that he had turned over to her all his wages, with which she ran the house and bought her clothing; that she had also some income from another source, but that she used all the money received from both sources,— it was held that she was dependent upon the wages of the deceased for support within the meaning of this provision.²¹³ A similar decision was reached where it appeared that the plaintiff, a sister of the deceased, was an invalid and not able to work regularly, and that she received monthly a sum of money from him for her support.²¹² But evidence showing that the deceased sent to the plaintiff a sum of money every other week or so with which to pay her rent; that she had no means of support except her own earnings; and that since the death of the

²¹¹ *Hodnett v. Boston & Albany Railroad*, 156 Mass. 86 (1892).

²¹² *Daly v. New Jersey Steel & Iron Co.*, 155 Mass. 1, 5 (1891).

Partial dependence for the necessities of life is enough. *Mulhall v. Fallon*, 176 Mass. 266, 267 (1900).

²¹³ *Houlihan v. Connecticut River Railroad*, 164 Mass. 555 (1895).

deceased she had been obliged to support herself, — was held not to satisfy this provision.²¹⁴

"SHALL HAVE A RIGHT OF ACTION FOR DAMAGES AGAINST THE EMPLOYER."

§ 291. The Section creates a New Right of Action. — As is pointed out by the court in the course of the opinion in *Ramsdell v. New York & New England Railroad*,²¹⁵ prior to

²¹⁴ *Hodnett v. Boston & Albany Railroad*, 156 Mass. 86 (1892).

Where it appeared that the deceased employee had been in the habit of giving to his mother substantially all of his wages and that she used them for the support of the family, which consisted of the father, the mother, and seven children; that the father earned a dollar and a quarter per day, which he gave to his wife, the mother of the deceased, except certain sums which were used for other purposes, it was held that the father could be found to be dependent upon the deceased and that the jury could have found that the mother acted for the father in receiving and expending the wages. *Welch v. New York, New Haven & Hartford Railroad*, 182 Mass. 84, 91 (1902).

In *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93 (1902), it was held that the following next of kin were dependent upon the wages of deceased employees for support within the meaning of this section, namely, the mother of the deceased, a widow who had other sons living with her and paying board, to whom the deceased had paid ten dollars and had promised to pay money every two weeks; the father of the deceased, who was destitute, feeble, and not able to work but was living with another son to whom he had conveyed his farm, the deceased having several times sent money to him; the father of the deceased, who had a mortgaged place, owned two steers and two cows, and was living with his wife and three sons and working at farming and fishing as he was able, the deceased having sent him money five or six times a year.

It was held in *Mulhall v. Fallon*, 176 Mass. 266, 267 (1900), that the question to what extent, if at all, the witness was dependent upon the deceased for support, was competent. "The extent to which particulars may be summed up in a general expression is a matter involving more or less discretion, and cannot be disposed of by the suggestion that the general expression involves the conclusion which the jury is to draw, or that it is law rather than fact. The question to what extent she was dependent upon her son called for details of fact in a perfectly proper way."

²¹⁵ 151 Mass. 245, 249 (1890).

For possible suggestions as to the form of declarations in actions by the widow, next of kin, or legal representatives of the deceased, see *Gustafsen v. Washburn & Moen Manuf. Co.*, 153 Mass. 468 (1891); *O'Keefe v. Brownell*, 156 Mass. 131 (1892); *Maher v. Boston & Albany Railroad*, 158 Mass. 36 (1893).

the enactment of this statute, "there was no law under which a widow or next of kin could recover at all for the death of the husband or relative." Hence this section gives a new right of action to the widow or the dependent next of kin of the deceased employee.

SECTION 74. If, under the provisions of either of the two preceding sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable.

The amount of damages which may be awarded in an action under the provisions of section seventy-one for a personal injury to an employee, in which no damages for his death are awarded under the provisions of section seventy-two, shall not exceed four thousand dollars.

The amount of damages which may be awarded in such action, if damages for his death are awarded under the provisions of section seventy-two, shall not exceed five thousand dollars for both the injury and the death, and shall be apportioned by the jury between the legal representatives of the employee and the persons who would have been entitled, under the provisions of section seventy-three, to bring an action for his death if it had been instantaneous or without conscious suffering.

The amount of damages which may be awarded in an action brought under the provisions of section seventy-three shall not be less than five hundred nor more than five thousand dollars.

§ 292. The Object of the Section. — This section of the statute deals altogether with matters relating to practice. The obvious aim of its provisions is to fix the limits to the amount that may be recovered as damages and to establish the measure of that amount where suit is brought for the death.

As to the amount of the damages, it may be noted that the section makes a distinction between actions for personal injuries under the provisions of section seventy-one and actions for death which is instantaneous or without conscious suffering, placing different limits upon the amount that may be recovered in each case.²¹⁶

²¹⁶ *Ramsdell v. New York, etc. Railroad*, 151 Mass. 245, 250 (1890); *Gustafsen v. Washburn & Moen Manuf. Co.*, 153 Mass. 468, 473 (1891).

And as to the measure of the amount of damages which may be recovered when an action is brought for the death of an employee, that, it may be noted, is the same as the measure fixed when an action is given against a railroad corporation or a street railway company for the death of a passenger²¹⁷ and against a city or town for the death of a traveller upon the highway.²¹⁸

SECTION 75. No action for the recovery of damages for injury or death under the provisions of sections seventy-one to seventy-four, inclusive, shall be maintained unless notice of the time, place and cause of the injury is given to the employer within sixty days, and the action is commenced within one year, after the accident which causes the injury or death. Such notice shall be in writing, signed by the person injured or by a person in his behalf; but if from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in this section, he may give it within ten days after such incapacity has been removed, and if he dies without having given the notice and without having been for ten days at any time after his injury of sufficient capacity to give it, his executor or administrator may give such notice within sixty days after his appointment. A notice given under the provisions of this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place or cause of the injury, if it is shown that there was no intention to mislead, and that the employer was not in fact misled thereby. The provisions of section twenty-two of chapter fifty-one shall apply to notices under the provisions of this section.

§ 293. The Object of the Section. — This section of the statute, like the preceding section, deals altogether with matters relating to practice. Its aim is, first, to fix the time within which an action to enforce the liability created by the statute must be brought and, second, to regulate the giving of the notice of the time, place and cause of the accident, which its provisions require.

²¹⁷ See § 162, *ante*.

²¹⁸ See page 36, *ante*.

"NO ACTION FOR THE RECOVERY OF DAMAGES FOR INJURY OR DEATH UNDER THE PROVISIONS OF SECTIONS SEVENTY-ONE TO SEVENTY-FOUR, INCLUSIVE, SHALL BE MAINTAINED UNLESS NOTICE OF THE TIME, PLACE AND CAUSE OF THE INJURY IS GIVEN TO THE EMPLOYER WITHIN SIXTY DAYS, AND THE ACTION IS COMMENCED WITHIN ONE YEAR, AFTER THE ACCIDENT WHICH CAUSES THE INJURY OR DEATH."

§ 294. The Requirement of Notice of the Accident.—This provision in terms requires the giving of a notice of the time, place and cause of the accident both in cases under section seventy-one, where the action is brought by the injured employee himself or by his legal representatives suing in his right, and in cases under sections seventy-two and seventy-three, where the action is brought by the legal representatives, or by the widow or the dependent next of kin for the death of the employee.²¹⁹

The requirement of a notice of the time, place and cause of the accident creates a strict condition precedent, and if for any reason a plaintiff has failed to comply with it, he cannot maintain an action under this statute.²²⁰ So strictly is this condition enforced that, in order to satisfy it, the notice must be actually served before the writ in the action is drawn; hence, although a notice given after the date of the writ is served upon the employer within the required number of days after the accident, it will not support the action.²²¹ And although knowledge of the contents of the notice may reach the employer within the prescribed time, if it is not addressed to him²²² or properly served upon him,²²³ it will not satisfy this requirement.

²¹⁹ See *Daly v. New Jersey Steel & Iron Co.*, 155 Mass. 1, 3 (1891).

²²⁰ *Foley v. Pettee Machine Works*, 149 Mass. 294, 296 (1889).

²²¹ *Veginan v. Morse*, 160 Mass. 143 (1893).

²²² *Harding v. Lynn & Boston Railroad*, 172 Mass. 415 (1899). Here the notice was addressed to the E. M. Company and was served on its president, who was also president of the defendant company, which company had recently leased the E. M. Company. This was held to be no notice to the defendant company.

²²³ *Healey v. George F. Blake Manuf. Co.*, 180 Mass. 270 (1902). In this case the defendant was a foreign corporation and the plaintiff

These provisions as to notice of the time, place and cause of the accident have, of course, no application to actions at common law.²²⁴

§ 295. **The Construction of the Notice of the Accident.** — It appears to have been the intention of the legislature, in enacting the provisions which require the giving of a notice of the time, place and cause of the accident, to have the employer apprised of the claims for damages to be made against him with such a reasonable degree of promptness as would enable him to investigate the case without delay, and to secure and preserve his evidence. Since this object can be accomplished equally well without insisting upon exact accuracy, enacting the provisions which require the giving of a notice given in accordance with the provisions of this section are not to be construed with technical strictness. Nevertheless, it should contain a reasonably correct statement of the required particulars of time, place and cause of the accident, and should also make it apparent in some way that it was intended to be made the basis of a claim for damages against the employer, and was given by, or on behalf of, the person who brings the suit.²²⁵

The question of the sufficiency of such a notice is to be determined from an inspection of the whole document,²²⁶ and is a question of law for the court and not of fact for the jury.²²⁷

served notice of the accident upon the Commissioner of Corporations, who sent a copy thereof to the defendant within the prescribed time. This was held not to be notice to the defendant. Speaking of this notice, the court says, at page 273: "It emanates from no court, is not dependent for its validity upon the action of any court, and is no part of any proceeding of a court for the purpose of getting jurisdiction over the defendant, or for any other purpose. It is simply a notice given *in pais* from one party to another, for the purpose of fixing a liability which otherwise would not arise to the dignity of a cause of action."

²²⁴ Ryalls v. Mechanics' Mills, 150 Mass. 190, 196 (1889).

²²⁵ Driscoll v. Fall River, 163 Mass. 105 (1895).

²²⁶ Lyman v. Hampshire, 138 Mass. 74 (1884).

²²⁷ Shea v. Lowell, 132 Mass. 187 (1882).

For notices which have been held to be sufficient, see Donahoe v. Old Colony Railroad, 153 Mass. 356 (1891); Brick v. Bosworth, 162 Mass. 334, 337 (1894).

§ 296. The Statement of the Time of the Accident. — It is not necessary to state in the notice the hour at which the accident happened, in the absence of any element that would make it important. As a general rule, therefore, a statement of the day alone is sufficient.²²⁸

§ 297. The Statement of the Place of the Accident. — It seems that while it may not be necessary to describe the exact spot where the accident happened with absolute accuracy of detail, yet the statement of the place should be sufficiently full and clear so that it can be identified with reasonable certainty.²²⁹

§ 298. The Statement of the Cause of the Accident. — A simple statement of the facts relating to the cause of the accident is sufficient to satisfy the requirements of this portion of the section. If the notice does this much, it is not defective merely because it does not state the ultimate cause of the accident. Thus the statement that the injury resulted from "the falling of a bank of earth" is a sufficient statement of the cause, although the plaintiff intended to rely upon the negligence of the defendant's superintendent in not properly shoring up the bank.²³⁰

It has been held furthermore that such a notice was not defective for the reason that it did not state the kind of negligence which caused the injury or death, so as to apprise the employer as to the clause of section seventy-one of the statute upon which the plaintiff was intending to base his claim.²³¹ And it has also been held that the notice was not defective simply because it stated more than one cause of the accident, each cause being sufficiently set forth.²³²

§ 299. The Service of the Notice of the Accident. — There is no provision of the statute that requires the notice of the time, place and cause of the accident to be served upon the

²²⁸ *Donahoe v. Old Colony Railroad*, 153 Mass. 356, 358, 361 (1891); and § 119, *ante*.

²²⁹ See § 120, *ante*.

²³⁰ *Lynch v. Allyn*, 160 Mass. 248, 255 (1893).

²³¹ *Brick v. Bosworth*, 162 Mass. 334, 336 (1894).

²³² *Coughlan v. Cambridge*, 166 Mass. 268, 276 (1896). See also § 121, *ante*.

employer in any particular manner. It is enough, therefore, if it is served in any way that will insure the document²³³ reaching the employer within the specified number of days. "With reference to the modes of service prescribed by the law in ordinary cases where notice is to be given, it is enough under this statute if a notice in proper form from the employee comes into the hands of the employer within thirty days²³⁴ after the accident." It was held, therefore, that due notice was given to the employer where a notice was taken to the office of its general superintendent, in its principal station in Boston, and, in his absence, was left for him there with a young man who appeared to be a clerk.²³⁵

If the notice is served upon the employer by an agent, it must appear that he was in some manner authorized so to do.²³⁶ The Commissioner of Corporations is not the agent

²³³ See *Healey v. George F. Blake Manuf. Co.*, 180 Mass. 270 (1902). The court here says that the notice "can be given to the defendant wherever he can be found, whether within or without the State, and by the person injured or by any person in his behalf."

²³⁴ The number of days within which the notice of the accident must be given was changed by Acts, 1900, ch. 446, and is now sixty. See this section.

²³⁵ *Shea v. New York, New Haven & Hartford Railroad*, 173 Mass. 177 (1899). In the course of the opinion in this case the court says: "From these facts it might fairly be inferred, in the absence of anything to show the contrary, that the notice speedily came into the hands of the superintendent. It might also fairly be inferred that the duties of a general superintendent were such as to make him a proper person to represent the corporation in receiving such a notice."

In *De Forge v. New York, New Haven & Hartford Railroad*, 178 Mass. 59 (1901), where it appeared that the notice was given to the defendant's freight agent, who forwarded it to the defendant's attorney in pursuance of general printed instructions and that he had received such notices for five years prior to the time in question, the court says: "We do not think it necessary to determine whether it would have been enough to show merely a notice given to a freight agent or to an attorney of the defendant, but when it appeared that the practice of giving notices in this way had been going on for so long a time, without, so far as appears, any objection being made, it might well be found that the defendant had recognized and acquiesced in the practice."

²³⁶ *Healey v. George F. Blake Manuf. Co.*, 180 Mass. 270 (1902). In this case the court says that the statute which requires a foreign corporation to appoint the Commissioner of Corporations its attorney upon whom all lawful process against it may be served "manifestly

of either party for the services of such a notice, even though the defendant is a foreign corporation which has duly appointed²³⁷ him its attorney upon whom all lawful processes against it might be served, and he undertakes to forward to the defendant a copy of a notice served upon him.²³⁸

§ 300. The Allegation in the Declaration of the Giving of the Notice of the Accident. — It is not necessary that the plaintiff should allege in his declaration the time when the notice of the time, place and cause of the accident was given to the defendant. An averment that it was "duly" given is sufficient.²³⁹

"SUCH NOTICE SHALL BE IN WRITING, SIGNED BY THE PERSON INJURED OR BY A PERSON IN HIS BEHALF;"

§ 301. The Signing of the Notice of the Accident by the Attorney. — Under this provision a notice that is signed with his own name by the attorney for the plaintiff is good, where there is evidence to show that he was authorized so to do.²⁴⁰ In the absence of positive evidence of such authority, it will be presumed, especially if the attorney who gave the notice also conducts the suit.²⁴¹

refers to process emanating from court, or by the authority of a court, and cannot be understood to refer to such acts or notices *in pais* between private parties as derive no authority from a court, but simply serve to create a right of action." Hence it was held that notice to the commissioner was not notice to the defendant. And it was further held that the fact that the commissioner sent a copy of the notice to the defendant did not help the matter. "He did this not as the agent of the plaintiff nor indeed as the agent of the defendant, but only as a public officer, acting in the discharge of a supposed public duty imposed upon him by the statute. . . . Since he was not in fact an agent of either party, and did not act or intend to act as such, the plaintiff cannot now, on the ground of attempted or intended agency, ratify the act as his or hold the defendant as though it were its act."

²³⁷ See Acts, 1903, ch. 437, § 58, which requires such appointment.

²³⁸ Steffe v. Old Colony Railroad, 156 Mass. 262 (1892).

²³⁹ Dolan v. Alley, 153 Mass. 380 (1891). The notice in that case was signed "C—— & P——, attorneys for Charles Dolan."

²⁴⁰ Steffe v. Old Colony Railroad, 156 Mass. 262 (1892).

In Greenstein v. Chick, 187 Mass. 157 (1905), the notice was signed "D—— B——, per H. B." It appeared that D—— B——, an attorney, dictated the notice to his stenographer, H. B., and that his name was

"BUT IF FROM PHYSICAL OR MENTAL INCAPACITY IT IS IMPOSSIBLE FOR THE PERSON INJURED TO GIVE THE NOTICE WITHIN THE TIME PROVIDED IN THIS SECTION, HE MAY GIVE IT WITHIN TEN DAYS AFTER SUCH INCAPACITY HAS BEEN REMOVED,"

§ 302. The Interpretation of this Provision. — The language used in this provision of the section follows very closely the language of that earlier statute which regulates the matter of the notice of the accident in cases of injury upon the highway. The interpretation placed by the court upon the similar provision of the earlier statute is, it may be assumed, the interpretation that will be applied to this provision.²⁴¹ And it has accordingly been held that "if a person is physically incapacitated from giving the notice personally, but is able to give the notice through others and mentally capable of so doing," it is not a case where, within the language of this provision, it is impossible for him, from mental or physical incapacity, to give the notice within the time provided.²⁴²

"AND IF HE DIES WITHOUT HAVING GIVEN THE NOTICE AND WITHOUT HAVING BEEN FOR TEN DAYS AT ANY TIME AFTER HIS INJURY OF SUFFICIENT CAPACITY TO GIVE IT, HIS EXECUTOR OR ADMINISTRATOR MAY GIVE SUCH NOTICE WITHIN SIXTY DAYS AFTER HIS APPOINTMENT."

§ 303. The Giving of the Notice of the Accident where Death was Instantaneous. — The question as to who should give the notice of the accident in cases under section seventy-three, where the employee was instantly killed or died without conscious suffering, has been much discussed. The result of the decisions upon the point is that in such cases the notice may be given either by some person on behalf of the deceased

written by her by his authority. D—— B—— had been retained to give the notice. The court held: "We have no doubt that the notice was sufficient."

²⁴¹ See § 128, *ante*.

²⁴² *Cogan v. Burnham*, 175 Mass. 391, 392 (1900).

For a case where it was held that the evidence failed to show that the notice was not given within the requisite number of days by reason of mental or physical incapacity, see *Ledwidge v. Hathaway*, 170 Mass. 348 (1898).

employee, within sixty days after the occurrence of the accident which caused the death,²⁴³ or by the executor or administrator, within sixty days after his appointment.²⁴⁴ A notice given by the latter will, therefore, support an action by the widow or the dependent next of kin.²⁴⁵

"A NOTICE GIVEN UNDER THE PROVISIONS OF THIS SECTION"

§ 304. The Construction of the Provision. — This provision is construed as limiting the scope of this section to "those extremes, if any, lying outside the common law rule," but coming within the provisions of this statute, "unless a case shall arise in which the plaintiff, although he has a remedy at common law, insists on relying upon the statute alone."²⁴⁶

"SHALL NOT BE HELD INVALID OR INSUFFICIENT SOLELY BY REASON OF AN INACCURACY IN STATING THE TIME, PLACE OR CAUSE OF THE INJURY, IF IT IS SHOWN THAT THERE WAS NO INTENTION TO MISLEAD, AND THAT THE EMPLOYER WAS NOT IN FACT MISLED THEREBY."

§ 305. When an Inaccuracy in the Notice of the Accident becomes Immaterial. — The question of the sufficiency or insufficiency of a notice becomes immaterial in any case where there is evidence, properly submitted to the jury, showing that there was no intention to mislead, and that the defendant was not in fact misled, by the notice actually given.²⁴⁷ The question raised by this provision is, of course, one of fact, and the burden of establishing it rests with the plaintiff who would take advantage of it.

²⁴³ Gustafsen v. Washburn & Moen Manuf. Co., 153 Mass. 468 (1891).

²⁴⁴ Daly v. New Jersey Steel & Iron Co., 155 Mass. 1 (1891).

²⁴⁵ Jones v. Boston & Albany Railroad, 157 Mass. 51 (1892); Dicker-
man v. Old Colony Railroad, 157 Mass. 52 (1892).

²⁴⁶ Ryalls v. Mechanics' Mills, 150 Mass. 190, 196 (1889).

²⁴⁷ Drommie v. Hogan, 153 Mass. 29 (1891).

"THE PROVISIONS OF SECTION TWENTY-TWO OF CHAPTER FIFTY-ONE SHALL APPLY TO NOTICES UNDER THE PROVISIONS OF THIS SECTION."

§ 306. What this Provision incorporates in the Section.
What Claim of Damages is Necessary in the Notice of the Accident. — The provisions of section twenty-two of chapter fifty-one, which are hereby made a part of this section, read as follows: "A defendant shall not avail himself in defence of any omission to state in such notice the time, place or cause of the injury or damage, unless, within five days after receipt of a notice, given within the time required by law and by an authorized person referring to the injuries sustained and claiming damages therefor, the person receiving such notice, or some person in his behalf, notifies in writing the person injured, his executor or administrator, or the person giving or serving such notice in his behalf, that his notice is insufficient and requests forthwith a written notice in compliance with law. If the person authorized to give such notice, within five days after the receipt of such request, gives a written notice complying with the law as to the time, place and cause of the injury or damage, such notice shall have the effect of the original notice, and shall be considered a part thereof."

As to the sentence of the above statute which requires the "claiming damages" for the injuries sustained, the court has held that it is parenthetical and does not call for a claim of damages in terms.²⁴⁸ "It is much more reasonable to suppose that the parenthetical sentence was intended as a statement of the existing law, than as a new enactment. If the defendant's contention is correct, the Legislature has put the insertion in a notice of a claim for damages on a higher plane than the statement of the time, place and cause of the injury. We cannot suppose that this was the intent of the

²⁴⁸ *Carroll v. New York, New Haven & Hartford Railroad*, 182 Mass. 237, 241 (1902). In this case the notice was signed by a firm of lawyers, and was served by a deputy sheriff. It was held that "there can be no doubt that this sufficiently informed the defendant that the plaintiff claimed damages."

Legislature, or that the parenthetical clause means anything more than that it must appear from the notice that it was intended as a basis of a claim against the person to whom the notice is given.”²⁴⁹

SECTION 76. If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or sub-contract shall not bar the liability of the employer for injuries to the employees of such contractor or sub-contractor, caused by any defect in the condition of the ways, works, machinery or plant, if they are the property of the employer or are furnished by him and if such defect arose, or had not been discovered or remedied, through the negligence of the employer or of some person entrusted by him with the duty of seeing that they were in proper condition.

§ 307. The Effect of this Section.— He who invites another to use his premises or appliances upon his premises is bound to exercise due care in order to see that they are in a safe and suitable condition. Upon this familiar duty is based the common law rule that if a principal furnishes premises or appliances upon his premises to an independent contractor whom he has employed to do his work, he will be liable to an employee of such contractor for any injury sustained by reason of his failure to use reasonable care and diligence in order to see that they were in proper condition. Under this rule the principal is equally liable whether the negligence is his own or that of his employee whom he has entrusted with the duty of seeing that the premises or appliances are in proper condition.²⁵⁰ The provisions of this section of the

²⁴⁹ Mr. Justice Lathrop in *Carroll v. New York, New Haven & Hartford Railroad*, 182 Mass. 237, 241 (1902).

A failure to give any notice of the time, place and cause of the accident is not an “omission to state” the time, place and cause of the accident in such notice, within the meaning of the statute referred to in this section. *Harding v. Lynn & Boston Railroad*, 172 Mass. 415 (1899).

²⁵⁰ *Mulchey v. Methodist Religious Society*, 125 Mass. 487 (1878), and cases cited; *Drommie v. Hogan*, 153 Mass. 29 (1891); *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124 (1874).

statute, it seems safe to say, go so far as to lay down the same rule; that they will go further may admit of serious question. With reference to that question it is hardly possible to say more than that, while no doubt the purpose of the section was to enlarge still further the liability of employers, it is not in the present state of the common law quite clear in just what direction that purpose is to have effect.²⁵¹

§ 308. **The Contractor may be the "Person entrusted."**—Under the provisions of this section, a person may occupy toward the employer a dual relation: he may, at the same time, be an independent contractor and a person entrusted with the duty of seeing that the ways, works, machinery or plant are in proper condition. If such a person is negligent in the performance of the duties of the latter position, the fact that he is also an independent contractor will in no way alter or affect the liability of the employer under this section of the statute for the consequences of that negligence.²⁵²

SECTION 77. An employee or his legal representatives shall not be entitled under the provisions of sections seventy-one to seventy-four, inclusive, to any right of action for damages against his employer if such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer who was entrusted with general superintendence.

§ 309. **This Section creates a Defence, not a Condition.**—As construed by the court, the provisions of this section do not create a condition precedent, the burden of showing compli-

²⁵¹ See Wood, Master and Servant, § 338, where it is suggested that if the principal agrees to furnish appliances for the work not connected with his premises, he would not be answerable to the contractor's employees for any defects therein. If this should prove to be the common law, it opens up a possible field for the operation of this section that is in accordance with its manifest purpose. And see the discussion in Coughtry *v.* Globe Woolen Co., 56 N. Y. 124 (1874).

²⁵² Toomey *v.* Donovan, 158 Mass. 232, 236 (1893).

For a case which was held on the facts not to come within the provisions of this section, see Dane *v.* Cochrane Chemical Co., 164 Mass. 453 (1895).

ance with which must be sustained by the plaintiff before he can maintain his action. Its effect is simply to create a special defence for the benefit of the employer. Upon this point the court in the course of the opinion in *Connolly v. Waltham*²⁵³ says: "The fifth section is not a part of the provisions which define the circumstances essential to show that a plaintiff comes within the right of recovery granted in the first section of the statute; nor is it a requirement that something shall at all events be done before the right of action accrues, such as giving due notice of the injury, but it excepts from the right to recover employees who, knowing the danger, fail to give information thereof within a reasonable time. As this exception is not in that portion of the statute which gives the right of action, and as the failure to give information does not prevent recovery unless the employee knows of the defect or negligence so long a time before his injury that he can reasonably give information, and with such knowledge fails to give the information, it is a matter of defence only, and need not be alleged or proved by the plaintiff."

§ 310. This Section does not apply where the Defect is Latent. — Obviously the provisions of this section can afford no defence to the employer where the defect that caused the injury or death was latent, or was of such a character as to call for special skill or peculiar knowledge and experience on the part of the employee in order to detect it. An employee cannot be required, on penalty of being barred of his action under this statute, to give to his employer notice of something which, so far as his knowledge goes, does not exist.²⁵⁴ Thus, where the plaintiff, a driver of a coal team, was injured by the breaking of a crank or handle used to raise the body of the wagon, and it appeared that he had noticed some time before the accident two scarf's or seams on the handle, one on each side, at the point where the break occurred and yet did not call them to the attention of his superior, it was held that since he could not be presumed to know, from the skill and experience he possessed, that the scarf's or seams were a defect, he was not deprived by the

²⁵³ 156 Mass. 368, 371 (1892).

provisions of this section of his right to recover compensation under the statute.²⁵⁴

²⁵⁴ *Murphy v. Marston Coal Co.*, 183 Mass. 385, 388 (1903).

For a case involving the question of the liability over of a person to a defendant against whom a judgment has been recovered under the employers' liability act, see *Consolidated, etc. Machine Company v. Bradley*, 171 Mass. 127 (1898).

CHAPTER VI.

THE STATUTORY LIABILITIES OF TELEGRAPH COMPANIES AND OF OTHER PERSONS AND CORPORATIONS.

PART I.

THE LIABILITY OF TELEGRAPH COMPANIES.

REVISED LAWS, CHAPTER 122, SECTION 15. A telegraph company shall be liable in damages to a person injured in his person or property by the poles, wires or other apparatus of such company. If they are erected upon a public way, the city or town shall not, by reason of anything contained in this chapter or done thereunder, be discharged from its liability, but all damages and costs recovered against it on account of such injury shall be reimbursed by the company which owns the poles, wires or other apparatus.¹

§ 311. **The Liability created by this Statute not based upon Negligence.**— Whether or not a telegraph company has exercised due care in placing or in maintaining its poles, wires or other apparatus is not material: it is liable under the provisions of this statute for any damages occasioned thereby without regard to negligence.² “The Legislature seems to

¹ The first sentence of this statute was enacted by the legislature in 1851 (Acts, 1851, ch. 247, § 2) while the provisions contained in the second sentence were added in 1859 (Acts, 1859, ch. 260, §§ 1, 2). With merely verbal changes the statute has been twice before re-enacted. Gen. Sts. ch. 64, § 11; Pub. Sts. ch. 109, § 12.

² Riley v. New England Telephone & Telegraph Co., 184 Mass. 150 (1903).

In this case it was held that the following instruction ought to have been given: “The defendant is liable to the plaintiff in this action if the latter, while travelling on the public highway, and in the exercise of due care, was injured by reason of a telegraph pole belonging to the defendant, although said pole was erected and maintained by the defendant in accordance with the license granted by the board of aldermen of the city of Cambridge.”

have recognized that the erection of the poles and fixtures in public ways, would create obstructions which might interfere to some extent with the use of the public streets and increase the liability of travellers to accidents. Such obstructions, whether placed in a sidewalk or in a part of a street designed for use by vehicles, being there when the streets are lighted and when they are in darkness, and in every variety of possible conditions, subject persons in the exercise of due care to risks which otherwise would not exist. While the Legislature saw fit to authorize the use of the streets for telegraph lines, it provided at the same time that the telegraph company should be liable for damages to all persons injured in person or property by these erections.”⁸

§ 312. **Contributory Negligence affords a Good Defence.** — Although under the provisions of this statute, telegraph companies are liable without regard to negligence on their part, they are not insurers against injuries to persons whose negligence contributes to the accident. “The language of this statute does not indicate that this absolute liability to persons injured, applies to persons who, by their own conduct,

⁸ Chief Justice Knowlton in *Riley v. New England Telephone & Telegraph Co.*, 184 Mass. 150, 152 (1903). The court says further: “Doubtless the fact that electricity is a subtle and dangerous agency, which was less understood in 1851 when this statute was enacted than it is now, was an added reason for creating this legal liability without regard to negligence. Wires and other apparatus, as possible causes of injury, are treated by the statute like posts. It might be difficult to prove, in case of an injury by a transmitter of electricity, whether the injury was caused by negligence or by pure accident. The statute indicates an intention on the part of the Legislature, that these erections in the street, which in many cases would constitute a public nuisance if not authorized by the statute, should be permitted only upon condition that those who use them to their own profit should make compensation for damages caused by them.”

Prior to this decision, the only intimation as to the construction of this statute was the following statement made in the course of the opinion in *Commonwealth v. Boston*, 97 Mass. 555, 558 (1867): “Whether this section is to be construed as giving or preserving a right of action, where the injury is caused by the mere placing of the poles at the places appointed for them, may perhaps admit of doubt. The liability of the poles to decay and fall, or to lean over, and of the wires to become displaced, would give the provision effect, if the right of the original location of them was regarded as unquestionable.”

would be precluded from recovery against a defendant in an action for negligence.”⁴

§ 313. **The Effect of the Final Provision of the Statute.** — Prior to the enactment of this portion of the statute in 1859, cities and towns were not liable, under the highway laws,⁵ for injuries occasioned to a traveller upon the public ways by telegraph poles placed therein under a license granted by the proper authorities, although such poles constituted a defect.⁶ The defence afforded, according to this rule of construction, by the fact that such poles were placed in the highway by public authority has been swept away by the provisions of this last portion of the statute.

PART II.

THE LIABILITY OF PERSONS AND CORPORATIONS IN GENERAL.

REVISED LAWS, CHAPTER 171, SECTION 2. If a person or corporation by his or its negligence, or by the gross negligence of his or its agents or servants while engaged in his or its business, causes the death of a person who is in the exercise of due care and not in his or its employment or service, he or it shall be liable in damages in the sum of not less than five hundred nor more than five thousand dollars to be assessed with reference to the degree of his or its culpability or of that of his or its agents or servants, to be recovered in an action of tort, commenced within one year after the injury which caused the death, by the executor or administrator of the deceased, one-half thereof to the

* Riley *v.* New England Telephone & Telegraph Co., 184 Mass. 150, 153 (1903).

* Rev. Laws, ch. 51, §§ 17-22.

* Young *v.* Yarmouth, 9 Gray, 386 (1857).

In Hector *v.* Boston Electric Light Co., 161 Mass. 558, 570 (1894), the court touched upon, but found it unnecessary to decide, the question whether this section was intended to include injuries received from an electric current transmitted through wires.

The provisions of this statute do not apply to companies engaged in the transmission of electricity for the purpose of lighting. Hector *v.* Boston Electric Light Co., 161 Mass. 558, 570 (1894); Illingsworth *v.* Same, 161 Mass. 583, 585 (1894).

use of the widow and one-half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin.

§ 314. **The Construction of the Statute.**—This statute, which was first enacted by the legislature in 1898,¹ does not create a distinctly new liability, but rather extends a liability² already in existence so as to make it apply to new parties. In making this extension the legislature has employed throughout the vital provisions, the identical words and phrases used in those earlier statutes that imposed the same liability upon particular parties. Consequently, in approaching the construction of this statute, it may be assumed that the legislature, in adopting language which had already received judicial interpretation as applied to the same subject-matter, sanctioned that construction, nothing to the contrary appearing in the statute itself. Therefore, the law developed under those earlier statutes may, it would appear, be invoked in aid of the interpretation of this later statute.³ And so we find it held that the same distinction between ordinary negligence and gross negligence, which was noted in those earlier statutes, is recognized in this statute.⁴

¹ Acts, 1898, ch. 565.

² This liability, up to 1898, had been confined to particular classes of persons and corporations: railroad corporations and street railway companies, Rev. Laws, ch. 111, § 267; proprietors of steamboats, stage-coaches and common carriers in general, Rev. Laws, ch. 70, § 6. See Chapter III.

³ *Whitcomb v. Rood*, 20 Vt. 49 (1847).

⁴ *Brennan v. Standard Oil Co.*, 187 Mass. 376, 378 (1905). “The degree of difference between negligence and gross negligence, under this statute, cannot be stated with mathematical accuracy. But gross negligence is a materially greater degree of negligence than the mere lack of ordinary care.”

It has been held that the jury was warranted in finding gross negligence on the part of the defendant’s servant where the evidence tended to show that immediately after a woman and the deceased, a boy five years of age, had stepped from the elevator, he started it upward without closing the door of the elevator well and the boy caught hold of the bottom of the elevator and was drawn into the well, *Hayes v. Pitts-Kimball Co.*, 183 Mass. 262, 264 (1903); and so where it appeared that the servant was notified of trouble with an electric light, located on a pole in a public

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street, and had authority to turn off the current but did not do so, *Lutolf v. United Electric Light Co.*, 184 Mass. 53 (1903).

In *Sullivan v. Boston Electric Light Co.*, 181 Mass. 294 (1902), the liability under this statute where the negligence is that of an independent contractor engaged in erecting a building upon the land of the defendant is somewhat considered.

A count at common law for conscious suffering cannot be joined with a count under this statute for causing death. In the first case the executor or administrator acts only as trustee for those interested in the estate of the deceased, while in the second case he acts only as trustee for the next of kin; the two claims do not accrue to him in the same capacity. *Brennan v. Standard Oil Co.*, 187 Mass. 376, 377 (1905).

The due care of the mother or guardian of an infant child, in actions under this statute, is considered in *Walsh v. Loorem*, 180 Mass. 18 (1901) and *Hayes v. Pitts-Kimball Co.*, 183 Mass. 262, 264 (1903).



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